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REPORTS  
FROM  
COMMITTEES:  
TWELVE VOLUMES.

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—(11.)—

SUPREME COURTS, SCOTLAND;  
CORONERS, MIDDLESEX.

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Session  
16 *January*—11 *August* 1840.

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VOL. XIV.

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# REPORTS FROM COMMITTEES:

1840.

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*TWELVE VOLUMES:—CONTENTS OF THE*

**ELEVENTH VOLUME.**

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*N.B.—THE Figures at the beginning of the line, correspond with the N° at the foot of each Report; and the Figures at the end of the line, refer to the MS. Paging of the Volumes arranged for The House of Commons.*

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# **R E P O R T**

**FROM**

**SELECT COMMITTEE**

**ON THE**

**SUPREME COURT OF JUDICATURE  
IN SCOTLAND;**

*WITH THE*

**MINUTES OF EVIDENCE,**

**APPENDIX, AND INDEX.**

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*Ordered, by The House of Commons, to be Printed,  
28 May 1840.*

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*Martis, 11<sup>o</sup> die Februarii, 1840.*

*Ordered, THAT* a Select Committee be appointed to inquire into the Administration of the Law in the Supreme Court of Scotland, with a view to ascertain whether the number of Judges may not be diminished.

*Martis, 25<sup>o</sup> die Februarii, 1840.*

*Ordered, THAT* the Committee do consist of—

Mr. Fox Maule.	Sir Charles Grey.
Mr. Wallace.	Sir Robert Harry Inglis.
Dr. Lushington.	Dr. Stock.
Mr. Goulburn.	Lord Teignmouth.
The Lord Advocate.	Mr. Horsman.
Sir William Rae.	Sir Thomas Acland.
Mr. Pigot.	Mr. Ewart.
Mr. Serjeant Jackson.	

*Ordered, THAT* the Committee have Power to send for Persons, Papers and Records; and that Five be the Quorum of the Committee.

*Jovis, 28<sup>o</sup> die Maii, 1840.*

*Ordered, THAT* the Committee have Power to report their Observations, together with the Minutes of the Evidence taken before them, to The House.

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## R E P O R T.

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THE SELECT COMMITTEE appointed to inquire into the ADMINISTRATION of the LAW in the SUPREME COURT of *Scotland*, with a view to ascertain whether the Number of Judges may not be diminished; and who were empowered to report their Observations thereupon to THE HOUSE, together with the MINUTES of the EVIDENCE taken before them:—HAVE considered the Matters to them referred, and agreed to the following REPORT:—

**W**ITHOUT entering into any detail of changes which have been made at different times in the constitution of the Court of Session, Your Committee may state generally, for the information of The House, that the Court at present consists of 13 Judges. The Lord President and three Senior Puisne Judges form what is termed the First Division of the Court; the Lord Justice Clerk and three Senior Puisne Judges form the Second Division of the Court: these two Divisions are termed the Inner House. The remaining five Puisne Judges officiate in what is called the Outer House as Lords Ordinary, each sitting singly; the last appointed of those Judges being more particularly occupied during the period of Session in what is termed the Bill Chamber, or in those proceedings, of the nature of injunction or stay of process, which require the more summary interposition of the Court. The great majority of cases, all cases indeed, with a few exceptions not worth mentioning here, are brought in the first instance, and in their earliest stage, before one or other of the Lords Ordinary; the record is made up before him, and under his superintendence, and the case prepared for decision. It is then argued before him, and, in general, decided by him. From his judgment there lies an appeal to the Inner House, in one or other of its Divisions. The judgment of the Division is final, subject only to appeal to the House of Lords. There is no appeal from one Division to the other, nor from one Division to the whole Court. But either Division may require the opinion of the other Judges; in which case, judgment is given according to the opinion of the majority of the whole Court. The party who comes into Court as plaintiff has it in his power to select, not only the Lord Ordinary before whom the cause shall in the first instance proceed, but also the Division by which the judgment of the Lord Ordinary, if appealed from, shall be reviewed. The two Divisions of the Court, it may be proper to observe, are thus in all respects of equal and co-ordinate jurisdiction. The same may be said of the Lords Ordinary, with the exception of a few cases reserved for the exclusive determination of the Inner House; each Lord Ordinary having in himself, for the decision of the cases before him, the full jurisdiction of the Court of Session, and his judgment, if not brought under review of the Inner House, becoming the judgment of the Court, not subject to appeal even to the House of Lords, which is only permitted when judgment has been given by the Court of Session in one of its inner chambers. The Court thus constituted has, in virtue either of original or appellate jurisdiction, cognizance of all civil causes and matters, with the exception of those only which are reserved for the Small Debt Courts, and of the revenue cases which are reserved for Exchequer. It were unnecessary, perhaps, to enter more minutely into the limits of its jurisdiction, but it may be proper to mention that the jurisdiction is exclusive as regards all questions of real property, and as to all other questions is subject only to this limitation, that no case under £.25 value can be brought before it originally.

Amidst the various changes which have been made in the Court of Session, particularly within the last 40 years, there has been no attempt to interfere with that part of its constitution or course of practice, which has left to a single Judge, in the first instance, the preparation and decision of causes, subjecting his judgment to review by either Division of the Court. The propriety of this arrangement has been repeatedly under consideration, but the weight of opinion has always been to continue it; and Your Committee, indeed, observe, that with great advantage

tage to the suitors, both as regards time and expense, cases amounting on an average to between a half and two-fifths have received their final decision in the Outer House. Your Committee, in prosecuting the more immediate subject of their inquiry, have assumed the expediency of this arrangement, which has always been considered as essential to the constitution of the Court and its course of practice.

Recent statutes, by abolishing the Courts of Admiralty and the Consistory Courts, have thrown into the Court of Session the whole business which came before those Courts respectively. But besides this, though the Court of Exchequer still remains as a separate jurisdiction, its judicial business is now discharged by two Judges of the Court of Session, sitting as Barons of Exchequer.

A far more important duty, and one of great labour and responsibility, devolves upon the Lord President, as Lord Justice General, and the Lord Justice Clerk, and five Puisne Judges of the Court of Session under a separate Commission, by which there is conferred upon them supreme criminal jurisdiction. From the great increase of population, and other causes, the duties of the Criminal Court have been very much increased, as will appear from successive returns before Your Committee. The Court of Justiciary sits as occasion requires, in Edinburgh, for despatch of business, embracing there the criminal business of the three Lothians, with such cases as, from their importance or other reason, are brought to Edinburgh for trial. In each year, during the vacations of the Court of Session, there are three spring circuits and three autumn circuits, with an additional winter circuit for Glasgow.

The business of the Court of Exchequer, and, during vacation, the business of the Bill Chamber department of the Court of Session, which require constant attendance, are discharged in rotation by those Judges of the Court of Session who are not included in the Commission of the Court of Justiciary. In enumerating the whole business thus devolving on the Supreme Judges of Scotland, the business of the Teind Court (embracing all questions as to the modification of stipends to the clergy, and the respective liabilities of the parties subject to the payment of stipend) must not be overlooked, nor the still more important duty of presiding in the trial of civil cases by jury, where under recent statutes that course of procedure is resorted to.

While Your Committee have thus called the consideration of The House to the constitution of the Court of Session, and the duties devolving upon the Judges, whether as members of that Court or under separate Commissions, they have more particularly to bring under notice one great and important change which was introduced into the proceedings of the Court by the statute commonly called the Scotch Judicature Act, passed in 1825. That statute had various important objects in view. One of these was to introduce such a change in the form of pleading as should separate and clearly distinguish the parties' averments in point of fact from what they maintained in law, binding them down to a statement of facts, which they should not be at liberty afterwards to withdraw or vary. As causes were previously prepared in the Court of Session, this object had been very much lost sight of, and cases were often argued, not in the Inner House only, but in the House of Lords, on appeal, upon statements of fact essentially different from those with reference to which judgment had been pronounced in the earlier stages. Another and not less important object of that statute was to substitute, as far as possible, *viva voce* argument for the written argument which then almost universally prevailed, and which in every case a party had it in his power to submit to the Court. To these objects was added another provision, that there should not, as before, be required two consecutive judgments of the same import by the Lord Ordinary, and again by the Inner House; but that the powers of the Ordinary and of the Court should be respectively exhausted by a single judgment. The effect of the changes introduced by this statute, as applied to the present constitution of the Court of Session, has formed a very prominent part of the investigation before Your Committee, both as respects its bearing on the immediate question, and the importance of the matter in itself.

The operation of the new system must be considered as it affects the proceedings before the Lords Ordinary, and as it affects those before the Inner House. It would



would appear that complaints exist as to certain parts of the procedure before the Lords Ordinary in preparing the record. This matter was brought before Your Committee in so far only as it affected the time and labour necessarily bestowed by the Judge ; and while Your Committee see no reason to withdraw the preparation of the case from the superintendence of the Judge, they have no doubt that, preserving that superintendence for all useful purposes, the system might, in many respects, be improved, so as not only to save a great deal of judicial time, but what is much more important for the suitor, prevent delay and expense in the progress of the cause. It does not belong to Your Committee to suggest any particular measures as proper to be adopted with this view, the improvement generally of the form of process not being before them ; but they think it proper to remark, that many of the evils complained of, and for which a remedy is most required, have arisen from this, that the form of process introduced by the statute 1825 was not equally well adapted to all forms of suit or subjects of litigation on the one hand, and that the Court, on the other, was so tied down by the express terms of the statute, as to prevent them from introducing by Acts of Sederunt or Rules of Court such modifications as would be not advantageous only, but necessary in several important classes of cases. Your Committee are of opinion that it would be proper to enlarge the power of the Court in this respect, under condition, however, that no such Acts of Sederunt or Rules of Court should come into operation till a certain time after they had been submitted to both Houses of Parliament.

But leaving out of view at present any change in the mode of pleading, Your Committee have great pleasure in stating that, with regard to the manner in which causes are heard and decided in the Outer House, the system has given general satisfaction to suitors, to the different departments of the legal profession, and to the public, and has gained entirely the confidence of the country. Nor can they be surprised at this result, considering the nature of the change, which, by proposing to substitute, to a considerable extent, oral for written argument, and full public discussion in addition to private study, gives assurance that the arguments of the parties have been considered, and that nothing had been left out of view which their professional advisers thought it right to urge in support of the grounds either of action or defence. Your Committee have every reason to believe that whatever defects still exist in the preparation of causes, leading to great tardiness and cost of proceeding, general satisfaction is justly felt with the manner in which causes are argued and judicially decided in the Outer House ; and this satisfaction appears to date from the commencement of the new system.

But, while Your Committee have to report this result as to the proceedings in the Outer House, they regret that they cannot make the same statement as regards the proceedings in either of the two divisions where the system of *vivâ voce* discussion has been but imperfectly adopted, and the advantages which it was intended to secure have not been realized. The witnesses who have been examined before Your Committee have expressed different opinions as to the extent to which the Court have exercised their power of ordering written argument. Whether that form of argument is or is not still adopted to an extent more than is necessary, there can be no doubt that a great number of cases, forming indeed a large majority of the whole, are now disposed of without that written argument which formerly in all cases was submitted to the Court ; and yet, while the Court are thus without the advantage, in such a number of cases, of the argument of the parties put in that shape, it does not appear, as might naturally have been expected, that the time judicially occupied by the Inner Houses of the Court has increased,—a fact which, of itself, shows that the *vivâ voce* discussion, from which alone, where written argument is dispensed with, the Court could learn the views of the parties, had not been sufficiently introduced. It will be seen, from a Return laid before Parliament, that the time daily occupied by either division of the Court does not extend on an average much beyond two hours a day, and of that time some part is always occupied in disposing of orders and motions of no great importance, though in some cases leading to discussion. Some of the witnesses have stated, that, on the average, this part of the business occupies at least a third of the time during which the Court sits, reducing to less than an hour and a half, if their statement be correct, the daily sitting of the Courts, in deciding causes, and in hearing argument with a view to their ultimate decision. Nothing has been made more clearly to appear than that the quantity of judicial time and labour employed in the adjudication

and consideration of cases cannot, according to the system prevalent in Scotland, be at all estimated by the time during which the Judges are present in the Court, and to this Your Committee will afterwards advert; but it is undeniable, that, notwithstanding the absence of written argument in the greater number of cases, there was not, till very recently indeed, any increase in the time occupied by the Judges in Court, and that even now their daily attendance for the purpose not only of hearing counsel, but of giving judgment in cases already heard, does not amount upon an average to so much as two hours a day.

Without at present referring to the circumstances from which this may arise, it can scarcely appear extraordinary that such result from a system intended to introduce full *viva voce* discussion, has not only failed to give satisfaction, but has caused dissatisfaction to the suitors, the profession, and the public. This was so much felt, that in 1833, eight years after the new system was in operation, the Royal Commission appointed to inquire into the practice of the Scotch Courts reported a strong opinion that there was a prevalent dissatisfaction with the manner in which causes were heard and disposed of in the Inner House,—the existence of which the Commissioners stated from their own experience and knowledge, as well as from evidence of persons of great authority whom they examined. The extent of the dissatisfaction, as well as the causes to which it was to be ascribed, could not be better shown than by the remedies which were then proposed, and which some of the witnesses examined before Your Committee would still apply. The remedies proposed are, that the Judges should not be previously furnished with the record and Lord Ordinaries' note of the judgment, and the grounds on which it rested, for the purpose of imposing upon them the necessity of having the cases fully opened on both sides, and compelling a sufficient hearing; and again, to insure deliberation previous to decision. Another suggestion is, that judgment never should be given in the Inner House on the same day on which a case has been argued; and some learned gentlemen are of opinion, that both these remedies should be established as a general rule, so as to produce the desired result in all cases. Your Committee by no means agree in the propriety of the remedies which have been thus suggested, and are of opinion, that a complete previous knowledge of the case by the Judge does not supersede or render superfluous a full and extensive statement from the Bar; but they are obliged to form, and cannot refrain from expressing, their opinion, that the want of sufficient hearing must have become very palpable before such remedies as those could have been even suggested.

There are other circumstances which strongly mark the present existence of the ground of former complaint, such as that the reasons of decision in the Inner House have, till very recently at least, been sometimes so imperfectly given as to have called forth the animadversion of the noble and learned Lords who at different times have advised the House of Lords in exercising their appellate jurisdiction. But without going through the evidence in detail, Your Committee are compelled to state, that, in their opinion, the system introduced in 1825 has not been fully carried out in the proceedings of the Inner House, and that dissatisfaction justly prevails as to the administration of this part of the judicial system of Scotland.

It is very much in consequence of this—it is in consequence of the sittings of the Court in public not being extended under a system which intended to substitute, as far as possible, oral for written argument—that an opinion has arisen, and apparently with reason, in many quarters, that the number of Judges in the Court of Session is too great for the business it has to discharge, and that by abridging the vacations of the Court, and prolonging the periods of its daily sittings, the whole business might be done by a reduced number of Judges.

If the attendance given by the Judges in Court were really any criterion of the time required for the judicial business of the country, Your Committee would have come to the conclusion, that the number of the Judges in the Court of Session might be considerably reduced, without prejudice to the administration of justice. But nothing certainly could be more erroneous than to take the time thus publicly occupied in Court as the criterion of their judicial labour. Under the former Scotch system, the Judges, having the written arguments of parties before them, were in possession of full materials on which to decide; they had the  
views

views of parties fully developed, and not only a reference to the authorities on which they respectively founded, but these authorities and their application fully canvassed and considered. From the perusal at home, therefore, of a case so thoroughly prepared, an opinion was necessarily and very properly formed; and any argument at the Bar was in a great measure superseded, both because it could only be a repetition of what had been already enforced by a discursive argument in writing, and because it was necessarily addressed to those who, having studied the case with the full means of forming an opinion, must, in a great measure, have made up their minds. Under the present system, where Cases are ordered, the result must be, in a great measure, the same; and, in point of fact, experience has shown, that in such instances but little supplementary argument is tendered from the Bar. Even when there is nothing but the record and the note of the Lord Ordinary explanatory of the ground of his judgment, the Judges still continue the same full and anxious study of the case at home, "ferreting out" (as one of the most judicious witnesses expressed it) the arguments of parties and the authorities bearing upon the case, and canvassing them and studying them only the more laboriously that they have not, as formerly, the assistance of the parties' argument in writing. The circumstance, therefore, that written argument has been partially superseded, has not so much lessened the private study of the Judges as might at first sight appear, and, in the opinion of some witnesses, has even increased their labour and anxiety at home. Although the quantity, therefore, of papers now submitted for the perusal of the Judge, by the abolition, in a great measure, of written arguments, is much less, the difficulty of acquiring that mature knowledge of the case which the former mode of discussion was calculated to insure is rather increased than diminished.

It is thus plain, as is more fully brought out in the evidence, that it would be altogether fallacious to estimate, from the attendance in Court, the Judges' labour at home; and although, in the opinion of Your Committee, a great deal more ought to be done in Court, they are certainly not prepared, upon the ground that the attendance in Court has hitherto been short, to consider that a much greater quantity of business might be despatched simply by increasing the period of attendance. That it would be better done by extending sittings in public is unquestionably true; that until it is so done, the dissatisfaction already referred to must exist is also undeniable; but, with regard to the extent of the business and the judicial labour required, taking into account what is done at home as well as what is done in public, Your Committee are not prepared to say that any reduction in the number of Judges ought to take place.

This question of reduction presents itself in various views; and the first point is, whether the judicial business of Scotland could be done without two Inner Houses. This question, however, must be considered, not with reference merely to the business of the Court of Session, or to the possible extension of its sittings, if that were the only Court in question, and cases of civil jurisdiction were only involved, but it must be considered with reference to the Judges who are occupied in the Court of Justiciary, both in Edinburgh and on the circuit; and the business of the Bill Chamber and occasional duties of the Exchequer must also be taken into account. Your Committee, therefore, see no grounds on which to say that one division would be sufficient to discharge the whole Civil business of the country.

In addition to the question whether the Inner House should consist of two divisions or of one, another arises as to the number of Judges of which a division should consist. Your Committee agree in the opinion expressed by most of the witnesses, that three would be a very inconvenient and disadvantageous number. Taken by itself, it does not, in the case of difference of opinion, give an authoritative majority. For if it be considered as a Court of Review proceeding upon the opinion of a single Judge brought up by appeal, a case might constantly be decided by an equality of voices, when two Judges were for altering the judgment of the Ordinary and one for affirming it; and it is with reference to a Court so constituted that the question arises. The existing number of four does not seem liable to these inconveniences, and should be continued for the same reasons which have led to its being preferred in some of the Courts in England.

Any reduction in the numbers of the Lords Ordinary seems at present impossible. The suitors' right of selecting the Judge before whom they are to bring their causes has given rise undoubtedly to great arrear before certain Judges; but even if the cases were equally distributed, it would appear from the evidence before Your Committee, that the number of five Judges is not more than sufficient for the discharge of the duties incumbent upon this part of the Court. It will be recollected that two-fifths of the causes, and sometimes a greater number, are finally decided in the Outer House; and although by an arrangement of business the Judges might be relieved of some details with which they are now encumbered, there seems no reason to think that so much time could be gained by such improvement as would enable fewer Judges to overtake the judicial business which must be performed by the Lords Ordinary.

Upon the principal question, therefore, submitted to Your Committee, they have to report to The House, that they have inquired into the administration of justice in Scotland, with a view to ascertain whether the number of Judges ought to be reduced, and that they are not prepared, under existing circumstances, to recommend such reduction. That opinion Your Committee entertain at present, and with reference to the improvements which they trust will be effected by carrying still further the system of *vivâ voce* discussion.

Your Committee, however, apprehend that they would insufficiently discharge their duty, if they did not bring more prominently under the consideration of The House a matter to which they have already partially adverted.

They see no ground to justify even the slightest imputation that the Judges of the Court of Session do not give the most conscientious consideration to the cases they are called upon to decide. Your Committee see no ground on which it could be maintained that, under any other system, even that which they are inclined to recommend, the actual decision would be generally different from that which under the present system is pronounced; but they cannot help observing, that the result, as regards the confidence of the suitors, as well as of the legal profession and the public, would be very different, if there were a fuller discussion in the Inner House. Your Committee are perfectly aware, that in a great many cases it would not be necessary to have the same full discussion in the Inner as in the Outer House, because the discussion in the Outer House must necessarily have a tendency to disencumber the case of a great many points raised, in the first instance, for consideration and argument, and to satisfy the parties that these points were, on the one side or the other, untenable, and to narrow the ground, therefore, upon which any useful conflict could be maintained,—a result very much assisted, not only by the judgment of the Lord Ordinary setting forth, in technical language, the grounds of his decision, but also by the note containing, often, a full statement of the case, while he explains in detail the reasons which dictated his judgment. Still, making allowance for those circumstances, it cannot be denied that the discussion in the Inner House is inadequate and unsatisfactory, and that the present practice of the Court, whatever may be the labour of the Judges at home, does not attain one great object for which the system of 1825 was introduced. The advantages of a full *vivâ voce* discussion, especially in a Court consisting of several Judges, the Committee think it unnecessary to dwell upon. It is not alone necessary that the decision should be just in itself, but it is highly important for the reputation of the Court, and for the authority of the law, and for the satisfaction of parties, and for the object of preventing unnecessary appeals, that it should be felt that everything which the professional advisers had to urge was fully heard. It is only by a full *vivâ voce* discussion in Court that the suitors can know that all the Judges have heard with attention, and given their own minds individually to the case, not leaning wholly or partially on others, or adopting their opinion,—an assurance which never can be the result of private and unseen study at home. It is after that form of discussion, carrying with it such advantages, that the Judges' private consideration of the case becomes most useful. And, lastly, nothing but a full statement in public of the grounds upon which the judgment rests can show that no important view of the case has been overlooked in the consideration of the Court, or can secure that important object in judicial decision, namely, "to put down in the party the conceit of his cause," while it raises his opinion of the patience and solicitude of the Judges. These advantages Your Committee think have not been attained to the extent that was looked for. They think dissatisfaction has been the consequence, and it may

may be that this dissatisfaction has been among the causes which have recently occasioned the diminution of the business of the Court of Session. It appears, too, that it has produced indirectly very undesirable results, by influencing, in some degree, the form of making up the records, and introducing a form of statement different from that which was intended; because parties, while they were naturally anxious to have the case fully before the Court, were, at the same time, distrustful of obtaining that object in the Inner House, by a full statement at the Bar, and prepared their pleadings accordingly. And Your Committee cannot but consider it as of bad consequence, that, by the present mode of discussing cases, the Court of Session in the Inner House does not afford what such a Court should eminently furnish,—a professional school, in which the Bar, and, indeed, both departments of the legal profession, may receive their discipline and training for the performance of their duties.

But though Your Committee unquestionably lament this dissatisfaction and the causes of it, they wish it to be distinctly understood that they do not refer it to any indifference on the part of the Judges about the scrupulous discharge of their duties. They ascribe it in a great measure to habits acquired, and to the practice established under the former system, and which, as in all other cases of change, it may require some time to efface. An opinion has been expressed in evidence, that the hearing of causes has become more full and satisfactory than it had before been; but, on the other hand, the small amount of time given in public to the performance of judicial duty, appears, by Parliamentary Returns, and the evidence of the witnesses, not to have been augmented; Your Committee, therefore, are not justified in concluding that the dissatisfaction which has so long prevailed has been materially diminished. Should, however, the improvement spoken of by the witnesses already referred to progressively advance, Your Committee cannot withhold the expression of their hope that all just ground of complaint will be removed.

Various propositions were made by witnesses examined before Your Committee as to relieving the Court from motions of course, and from difficulties connected with the attendance of the Bar in different Courts, so as to give increased facilities for the despatch of business. Such of these suggestions as are intended to relieve the Inner Houses and the Lords Ordinary from business of form and motions of course, would be better left for the regulation of the Court itself by Act of Sederunt. Your Committee certainly do not think that the active and vigilant superintendence of the Lords Ordinary should be withdrawn from the preparation of the record and the procedure before completing it. It is clear that those motions of form occupy a small portion of time in the Inner House, though no doubt a considerable portion of the time during which either division actually sits at present. Much the more important suggestions relate to the extended sittings of the Court—to the necessity of their sitting during a much longer time every day—to their sitting on Mondays—and to their availing themselves, if necessary, of the power to prolong the Session; and to these Your Committee have given their attention. If it should appear that a greater portion of time than can be given during the present terms is required for fuller judicial discussion, and a proper despatch of business, it ought to be obtained by curtailing the vacations, whether as regards the Outer or Inner Houses. They are aware that the Court of Justiciary frequently sits on Monday; but they do not see that that circumstance necessarily interferes with arrangements by which that day might be gained for one or both divisions of the Court. A great deal might be accomplished by the divisions sitting alternate days, or, at all events, by using the Wednesday occupied in the business of the Teind Court, which, though important, is not extensive. If it were necessary for the purpose of gaining additional time, as the sittings of the Court of Justiciary cannot be interfered with, it might be proper to enable that Court to sit at Edinburgh, with two Judges, or with a single Judge, as on the circuit, providing for an attendance of the High Court, as it is termed, or a quorum of three Justiciary Judges, in cases of peculiar importance. Without altering the days on which the Court meet for the despatch of business, a great deal of time might be saved and most usefully employed by holding the meetings of the Judges upon those occasions, where the whole Court is called upon to advise regularly, but exclusively, upon Mondays, or upon the Wednesdays appropriated to the sittings of the Teind Court, so as to forward that

important branch of judicial business, without interrupting the ordinary discharge of the rest. These, however, are matters of detail upon which Your Committee thought it unnecessary to enter at length, being satisfied that, if the views which they have ventured to suggest should be considered as correct, there can be little difficulty, even without legislative interference, and under the existing powers of the Court, to adopt such arrangements as would give great additional time. Arrangements, however, may be necessary beyond the power of the Court, in which case recourse must be had to the intervention of Parliament.

28 *May* 1840.

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## PROCEEDINGS OF THE COMMITTEE.

## QUESTIONS, DIVISIONS, &amp;c.

*Lunæ, 30<sup>o</sup> die Martii, 1840.*

Mr. James Johnstone Darling called in; and Examined.

Motion made (by Dr. Lushington), and Question put,—

“That the evidence of Mr. Darling, so far as relates to the detail of the Bill referred to by the witness, and extracts read therefrom, be expunged; and that leave be given to insert the Bill in the Appendix.” App. (N.) p. 249.

The Committee divided:—

Ayes, 7.  
Dr. Lushington.  
Mr. Serjeant Jackson.  
Sir Robert Inglis.  
Sir William Rae.  
Dr. Stock.  
Sir Charles Grey.  
Lord Teignmouth.

Noes, 1.  
Mr. Wallace.

So it was resolved in the affirmative.

Evidence expunged accordingly.

*Veneris, 3<sup>o</sup> die Aprilis, 1840.*

John Hope, Esq., Dean of the Faculty of Advocates, again called in; and further Examined.

In the course of the examination a Question having been put to the witness (by Mr. Wallace),—

The said Question was objected to.

Motion made (by Dr. Lushington), and Question put,—

“That the Question be expunged from the minutes.”

The Committee divided:—

Ayes, 5.  
Dr. Lushington.  
Dr. Stock.  
Sir Charles Grey.  
Sir William Rae.  
The Lord Advocate.

Noes, 1.  
Mr. Wallace.

So it was resolved in the affirmative.

Question expunged accordingly.

*Lunæ, 11<sup>o</sup> die Maii, 1840.*

The Chairman presented to the Committee the Draft of a Report; and the same having been read by him to the Committee,

Motion made (by Sir William Rae),—

“That that part of the Report which refers to the alleged dissatisfaction with the mode of hearing and deciding causes in the Inner Houses of the Court of Session be re-modelled, and that the Report should more particularly point out the causes which have led to the course of proceedings complained of, arising from long habits affecting not merely the Bench but the whole legal Profession. That the Report should express satisfaction with the improvement gradually developing itself in the foresaid respects, and announce a strong conviction



viction on the part of the Committee, that the Court will zealously apply itself to the providing every useful remedy within their power to what may constitute a real ground of complaint."

Amendment proposed (by Dr. Lushington), to leave out all the words after the first word "That" in order to add "the Committee do now proceed to the consideration of the Draft Report submitted to them by the Chairman."

Question put,—

"That the words proposed to be left out stand part."

The Committee divided :—

Ayes, 1.  
Mr. Wallace.

Noes, 7.  
Dr. Lushington.  
Sir Charles Grey.  
Mr. Serjeant Jackson.  
Dr. Stock.  
Mr. Horsman.  
Lord Teignmouth.  
The Lord Advocate.

So it passed in the negative.

Question as amended put and agreed to.

The Committee accordingly proceeded to the consideration of the Draft Report submitted to them by the Chairman.

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*Lunæ, 18<sup>o</sup> die Maii, 1840.*

The Committee having concluded the consideration of the Draft Report submitted to them by the Chairman :

Amendment proposed (by Mr. Wallace),—"To insert at the end of the Report the following words :—

"In conclusion, Your Committee consider it their duty to state explicitly their opinion, that, without the interference of Parliament, it will be impossible for the Judges of the Court of Session so to re-model and arrange the present Rules of Court and Forms of Process, as to insure to the people of Scotland the just, deliberate and effectual administration of the law ; and that a sense of justice to the Judges, as well as to the best interests of that country, require that this should be distinctly expressed to The House.

"In proof of the necessity which exists for legislative aid, Your Committee will enumerate the several important parts of the practice and forms of process in the Court of Session on which changes must be made under the sanction of Parliament, seeing the evidence clearly shows that to the imperfect, undefined or faulty state of these, a great part of the delay, expense and existing dissatisfaction is attributable, and also that the Court does not possess sufficient power to remedy the evils.

"1st. The defective state of the statute of 1825, commonly called the Judicature Act.

"2d. The imperfect or improper manner in which the Record may be made up, and in practice has been very often made up, ever since 1825.

"3d. The statements and pleadings which may be put in the Record, and the frequent revisions which have been permitted under the Judicature Act.

"4th. The heavy arrears in the Courts of the Lords Ordinary, in consequence of each Judge holding weekly only Four Courts, and the encumbering of these Judges with the performance of various duties of which they might be well relieved.

"5th. The improper apportionment or rotation of the duties of the Judges, by which some are tasked heavily, while the larger number have comparatively little to do.

"6th. The still more improper practice of holding Six Courts on the same days, which sit during the same hours ; and with no separation or apportionment of Counsel to these Courts.

"7th. The shortness of the Sessions, and great length of the Vacations.

"8th. The burthening the Judges of the Inner Houses, when on the bench, as the Judges in the Outer House also are, with motions and other matters of course and routine, which might with advantage be devolved on them at chambers, or on officers of Court.

"9th. The

"9th. The want of sufficient powers to enable the Judges to well regulate the proceedings of the Court.

"10th. To enact that the Six Courts shall not continue to meet on the same days, and that they shall meet on alternate days, and at convenient hours of the day, so as to avoid the frequent delays so much complained of, and accommodate, as far as possible, the very limited number of 'well-employed Counsel' at the bar.

"11th. To empower a single Judge, or Two Judges, to officiate in the Court of Justiciary in Edinburgh, as they do when holding Assizes on Circuit, in place of requiring, as is the case at present, that three Judges shall try weekly the very same offences in Edinburgh, which One or Two at most try at the end of Six Months when going Circuit.

"12th. It will also be proper to enact, that the Judges shall forthwith proceed to revise and consolidate the Acts of Sederunt which have been passed by their predecessors and themselves, so that these shall no longer remain in the state of uncertainty and confusion they are in at present, to the great loss of suitors, by their being compelled to litigate and settle doubtful points in the Rules and Forms of Court, *which it is the bounden duty of the Judges, whose privilege and province it is to frame and pass these, always to exhibit in a clear and intelligible state to suitors and the whole body of the legal profession throughout Scotland.*

"13th. That the Judges of the Court of Session, before separating for the Summer Vacation in any year, shall, after the Courts rise, devote a sufficient period of the ample time which is at their own disposal, to revise and carefully correct such Acts of Sederunt as have been disputed or held to be doubtful in the course of the year's practice, and forthwith publish the same, when so amended, and also report to Parliament, when it next meets, that this has been done accordingly.

"Seeing that the above important improvements, as well as others of less consequence, cannot be effected without the aid of Parliament, Your Committee are assured it will only be necessary to make this known to The House, in order to insure immediate measures being taken for allaying and removing the existing dissatisfaction, and so to conduct the judicial business of the country, as will secure respect for the Judges and supremacy for the law, whether it shall be administered by Thirteen, or by a smaller number of Judges; and therefore Your Committee recommend that the necessary legislative means may be resorted to."

Question put,—

"That those words be there inserted."

Ayes, 1.  
Mr. Wallace.

Noes, 4.  
The Lord Advocate.  
Mr. Ewart.  
Dr. Lushington.  
Mr. Serjeant Jackson.

So it passed in the negative.

Question proposed (by Dr. Lushington),—

"That the Draft Report submitted by the Chairman, and as amended by the Committee, be adopted."

Amendment proposed (by Mr. Wallace),—

"To leave out all the words after 'by,' in order to insert, 'Mr. Wallace to the Committee be adopted in lieu thereof.'"

Question put,—

"That the words proposed to be left out stand part."

The Committee divided,—

Ayes, 4.  
Dr. Lushington.  
Mr. Ewart.  
The Lord Advocate.  
Mr. Serjeant Jackson.

Noes, 1.  
Mr. Wallace.

Main question put,—

"That the Draft Report submitted by the Chairman, and as amended by the Committee, be adopted."

Agreed to.

Motion made (by Mr. Ewart),—

"That the Report submitted by Mr. Wallace be entered in the Proceedings of the Committee."

Put and agreed to.

REPORT submitted by Mr. Wallace, and disagreed to by the Committee.

From the nature and extent of the Evidence, it will be seen that Your Committee have taken considerable pains to inquire into the subject referred to them, and that many matters of deep importance have transpired.

#### *General Dissatisfaction.*

Q. 103. 214. 529.  
539. 612. 694.  
861. 1030. 1394.  
1824. 2248. 2458.  
2485. 2601. 2856.  
2847. 2855.

It appears from the concurrent testimony of highly respectable witnesses, all of whom, be it observed, belong to one branch or other of the legal profession in Edinburgh, that throughout Scotland dissatisfaction prevails generally in regard to the administration of justice in the Outer, but more especially in the Inner Houses of the Court of Session, to allay or remove which Your Committee feel it an imperative duty, and therefore recommend that immediate measures should be effectually adopted to secure a result so desirable.

The testimony shows that the dissatisfaction arises from various causes, which Your Committee will enumerate.

#### *Number of Judges.*

There are Thirteen Judges in the Supreme Court of Scotland.

#### *Inner Houses.*

There are Two Courts of Review, with Four Judges in each Court, having the same powers and jurisdiction, holding the same sessions, meeting on the same days, and at the same hours daily, which appears to be objectionable on principle, and certainly is inconvenient in practice.

Q. 423. 589. 754. 839.  
1412. 1463. 1804. 1910.  
1940. 1949. 2179. 2180.  
2256. 2278. 2364. 2460.  
2469. 2587. 2589. 2618.  
2638. 2658. 2813. 2837.

It has been incontestably proved, by the great majority of the witnesses, that the mode of hearing Counsel and determining Causes in the two Inner Chambers of the Court of Session is defective, being calculated to create or keep up dissatisfaction with the mode in which justice is administered to suitors, and to afford little satisfaction to the Counsel, or the agents who conduct their causes.

Q. 49. 108. 145.  
211. 407. 422. 426.  
552. 857. 892.  
1246. 1249. 1279.  
2365. 2366. 2367.  
2368. 2444. 2461.  
2611. 2639. 2745.

It appears that Counsel are, at times, either checked or repressed by the Judges when endeavouring to state fully the whole case they are entrusted with; or are deterred by symptoms of impatience, arising, it is supposed, from preconceived opinions formed by the Bench, acquired from the perusal of papers submitted for their information previous to a debate in Court, which prevents Counsel adducing the whole arguments, and quoting deliberately the authorities upon which they rely for the clear elucidation of the case.

The few hours during which the Inner Houses sit, not exceeding two or three daily, as appear from Returns, induces the supposition on the part of suitors, that their causes have been delayed unnecessarily, or have not been carefully and deliberately argued and considered in Court.

This hasty mode of administering justice has evidently not been attended with due regard to the importance of the law being laid down, and the reasons being declared in that full, deliberate and dignified manner so essentially requisite to obtain the respect of suitors and the public for the supremacy of the law, and enable professional men to explain to losing parties why their suits had been unsuccessful.

On the above points the evidence is generally concurrent and strong, although not unanimous.

#### *Lords Ordinary.*

Q. 80. 82. 356. 357.  
396. 399. 403. 469.  
474. 479. 481. 596.  
667. 669. 765. 775.  
913. 946. 1269. 1275.  
1398. 1483. 1514.  
1550. 1761. 1766.  
1772. 1810. 1954.  
2119. 2369. 2550.  
2690. 2803.

There are five other independent Courts, called the Courts of the Lords Ordinary, each presided over by a single Judge, holding nearly the same sessions, each sitting four days weekly, and for the greater part during the same days and hours as the Two Courts of Review.

Thus there are Six courts sitting at the same time, without any division or apportionment of Counsel, all of whom practise in these Courts, which is found highly inconvenient.

The Lords Ordinary, as appears from returns, as well as from evidence, have a laborious task to perform, and go through a great deal of business, considering the short period of 103 days, and four hours daily, which they sit in Court, although encumbered by certain forms and other proceedings, of which, it is strongly alleged, they might be beneficially relieved.

The Counsel belonging to the Scotch Bar, who have appeared as witnesses, agree with their professional brethren, the Writers to the Signet and Solicitors before the Supreme Court, that the Outer House practice is much more perfect than that of the Inner Houses.

Q. 224. 230. 444.  
538. 680. 871.  
1335. 1406. 1504.  
1710. 1810. 2084.  
2184. 2214. 2415.  
2534.

The Counsel state, that there is little room for complaint or improvement in this Court; while at the same time they admit business is liable to interruption, and actually is frequently suspended in consequence of their absence, when attending to their duties before one or other of the Six Courts, all of which, it must be specially borne in mind, sit on the same days and during the same hours for a considerable portion of each day, *although there is not more than one leading Counsel for each COURT, and not more than 20 to 30 well-employed COUNSEL in all, at the SCOTCH BAR, (or about double the number of the Judges).*

On the other hand, the Writers to the Signet and Solicitors before these Six Courts complain of the interruption continually arising to the progress of suits, as also of the increased delay and expense, in consequence of the same Counsel engaging to appear before all of these Six Courts, which engagements they of course frequently cannot fulfil, although they

they take fees as if they appeared in each case they had been retained in; and all these witnesses admit this to be one great cause of dissatisfaction and complaint with suitors.

Another cause of complaint is, that the Judges of the Inner Houses, whose hours of sitting average only from two to three daily, require the attendance of Counsel from the Outer House at a moment's warning, although they may, when called away, be engaged in a most important debate, the interruption of which may be of great injury to the parties, and in fact is often accompanied by delay, expense and disappointment, which suitors cannot see to be just, and therefore express their dissatisfaction with the system.

Suitors and their agents complain that this system of hearing causes bit by bit on the same day, or by snatches from day to day, week to week, or even month to month, or when postponed over the whole long vacation of four months, as the case may be, is unjustifiable on principle, vexatious in practice, and extremely expensive and unsatisfactory.

It also appears that the Judges in the Outer House submit to these frequent, if not continual, interruptions to business, although they are individually responsible for the conduct of their Courts, and are perfectly independent of the Judges of the Inner Houses.

Some of the Lords Ordinary have more than double the number of causes brought before them than others. Various plans have been suggested for equalizing the number, and spreading the labour more equally over all, but none has met with any general concurrence.

The evil of the unequal duty is great, and should be remedied immediately.

#### *Motions of Course—Routine and Formal Business.*

A great deal of evidence shows that the Judges in all the Courts might safely and with benefit to the public, be relieved in part, if not wholly, from this sort of duty.

Similar opinions have been even more strongly expressed by members of the Bar, Writers to the Signet and Solicitors, when examined by the Law Commission in 1834 and 1835; for which, see Appendix to the First and Second Reports of that Commission.

Your Committee beg to refer The House to the mass of evidence to be found in former Reports, and in the Appendix to this Report, in support of the recommendations which have been made with a view to relieve the Judges of the Court of Session from every extrajudicial duty, in which opinions they cordially agree.

#### *Making up the Record, and Revisal of Papers.*

It appears that the present prescribed regulations and forms for making up Records are of late introduction, and very defective, as they admit of reiterating facts and arguments and pleas in law, under the form of new productions, which repetitions are technically called Revisals; many of the evils complained of are attributable to these, and the witnesses all agree that this should be put a stop to by an Act of Parliament or Rule of Court.

#### *Proceedings in Court.*

It has been urged by almost all the witnesses, that, contrary to the spirit of the statute passed in 1825, called the Judicature Act, the Judges still adhere to the old practice of trusting much more to the reading of printed papers, and giving their decisions in writing, than to parole proceedings. The former allegation applies to the Judges of the Inner Houses, the latter to the Lords Ordinary; and it would seem that both practices require considerable amendment.

It is to be also remarked, that the unsatisfactory habits of the Judges of the Inner Houses has frequently been commented on during the discussion of Appeals from the Court of Session in the House of Lords, and that the mode of deciding causes in these Courts, has from time to time called forth pointed and forcible remarks from the Lord Chancellor and other learned Lords in that tribunal, which observations were by no means complimentary to the proceedings of the learned Judges in the Scotch Court, and doubtless must have added to the existing national distrust and dissatisfaction.

#### *Teind Court.*

It appears from a Return (see Appendix), that the business of this Court has been rapidly declining for the last Ten years, as in the first of these years 168 causes were decided, while in the last, 47 only have been settled. It is evident, therefore, that a great saving of the occupation of the Judges has taken place in this once important branch, leaving at their disposal more time for other judicial duties.

#### *Decrease of Business.—[See Appendix and former Reports and Returns.]*

Periodical and annual Returns to Parliament show that for a great number of years past, the decrease of business of the Court of Session has been large and progressive, being equal to nearly One-half in the last Forty years, and very considerable since 1825, although the population, as well as wealth and enterprise of the country, in agriculture, in commerce, and in the arts, have increased prodigiously during the same period; therefore it appears to Your Committee that the Judges must have much less to do and more time at their disposal than they had formerly.

Q. 230. 872.

Q. 443. 1499. 1668.  
1713. 1719. 1721.  
1722. 1728. 1749.  
1751. 1770. 1771.  
1852. 1952. 1988.  
2014. 2054. 2057.  
2081. 2131. 2228.  
2232. 2238. 2275.  
2341. 2401.

Q. 154. 396. 425.  
426. 767. 878. 953.  
1490. 1493. 1495.  
1554. 1555. 2058.  
2324. 2467.

Q. 33. 34. 1281.  
1283. 1446. 1448.  
1950. 2470. 2620.  
2806.

Q. 55. 135. 1590.  
1592. 2702.

Q. 710.

Q. 110. 111. 161.  
181. 393. 440. 650.  
902. 909. 1091.  
1172. 1207. 1221.  
1256. 1630. 1652.  
1666. 1937. 2241.  
2808. 2859.

*Importance of Business.*

Q. 1632. 1637.  
1645. 2007. 2111.

It has been attempted, nevertheless, to show, that the nature of the business now transacted is more important in its character than formerly. This allegation, however, is unsupported by any kind of proof; while it is in evidence that various descriptions of very important business have largely decreased, or nearly ceased, since the passing of the Reform Act, as has been specially pointed out by several witnesses.

*Arrears.—[See Parliamentary Returns and Appendix.]*

Q. 496. 507. 511. 1310.  
1421. 1453. 1483. 1484.  
1627. 1767. 1944. 2025.  
2045. 2191. 2253. 2431.  
2775. 2815.

It appears from Returns to Parliament that a large and increasing arrear of business has taken place of late years before the Lords Ordinary,—an evil accompanied by the most serious consequences to the public, and demanding immediate attention, with a view to a remedy being speedily devised.

Q. 204. 257.

It is in evidence that there is no arrear in the business of the two Inner Chambers, the sittings of which of late years and during the past winter session have only been from two to three hours daily; and as the Judges in these have not nearly so many printed papers to read as they had formerly, they must have more time at their disposal than heretofore, and, consequently, could perform more judicial duty, did the country require it.

*Printed and Written Papers.*

Q. 243. 523. 793.  
835. 837. 1109.  
1235. 1413. 1531.  
1734. 1997. 2011.  
2240. 2705. 2827.

It has been stated by all the witnesses, and is uncontradicted, that printed and written papers for the consideration of the Bench have been gradually reduced in number and extent for a considerable period of years past, and are much less voluminous than formerly; consequently the Judges have now no such quantity of papers to examine or wade through as they at one time had, either in sessions or during vacations.

Although none of the witnesses have directly alleged that the Judges do not read the printed papers they are furnished with, they have not hesitated to say that suitors, their agents or Counsel, have no means of knowing that these papers, which exhibit such an expensive item in their charges, have really been applied to any useful purpose; and they say they would prefer trusting to the deliberate and open discussion in Court of their lawsuits. This change, being so much urged by parties conversant with the practice of the Courts, will make it evident that the Judges should sit longer, and shows that the former reason for lengthened vacations, namely, the reading of voluminous papers, will no longer have any existence.

*Increased Daily Sittings recommended.*

Q. 913. 918. 921.  
1514. 1651. 1708.  
1727. 1767. 1991.  
1994. 2024. 2033.  
2131. 2132. 2165.  
2268. 2293. 2294.  
2341. 2409. 2757.

It will be seen from Returns made, that the Judges in the Inner Houses sit in Court only two or three hours daily during the five days of the week on which these Courts meet.

It also appears the Lords Ordinary sit on an average only four hours daily on the four days of the week on which they hold Courts; it has been urged, that the hours of the Inner Chambers should be considerably increased; and that the days and hours of sitting of the Lords Ordinary should also be increased; in which opinions Your Committee concur, to the fullest extent which may be necessary, for the deliberate and complete performance of the public service, and for removing complaints in consequence of the delay and arrears of business.

*Number of leading and well-employed Counsel at present at the Scotch Bar.*

Q. 1193. 1400.  
1524. 1781. 2048.  
2051. 2052. 2053.  
2220. 2223.

Doubtless great surprise has been created by finding that before the Supreme Court of Scotland, consisting of Thirteen Judges, with a bar where there are no silk gowns, or any kind of precedence (with the exception of the Dean of Faculty and the two Law Officers of the Crown for the time being), there are not more than five or six leading Counsel; and including these, that there are not 30 in all of what is called "well-employed" Counsel. Your Committee can only account for this by referring to the great decrease of business which has taken place during the last 40 years, and the regular decline in the number of Causes tried in the Court of Session during the last 10 years; and also to the system adverted to elsewhere in this Report, whereby it is shown that it is the prevailing custom to engage two of the said five or six leading Counsel to appear in almost every case, without stipulating for their actual attendance; and that the Judges presiding over the different Courts have so far given into and sanctioned this, as to be in the constant practice of postponing or stopping any cause, even although actually begun and in progress of being heard, until two of the absent individuals of the favoured few shall appear. It is proper The House and the country should have these facts before them.

*To provide for Absence of Counsel.*

To obviate this increasing evil so universally complained of, and to give the regular progress of business in the Courts precedence over the interests of Counsel, or those of an occasional suitor, it is submitted that an Act of Sederunt or Rule of Court should be made, by which the Judges shall be enjoined not to postpone or interrupt the proceeding in any action on account of absent Counsel, and thereby approximate and improve upon the Act of Sederunt of 1604, still unrepealed—as to the conditional apportioning of Counsel—and also place

place suitors on a footing of just equality in the prosecution and defence of their causes, and carry out the spirit of the said Act of Sederunt, which evidently is as necessary now as it ever could have been, and is as follows:—

EXTRACT from ACT of SEDERUNT, 11th January 1604.

FOR removing of that impediment of proceeding in the utter-hous, (that the procurator is thair ben,) it is appointit to be the saidis lordis, that thair sal be fyftein advocattis nominat, quha sal be appointit for the inner-hous, and quahatever client sal haif occasion to employ ony of these, in ony action to be decydit in the utter-hous, the saime client is heirby willit and advysit to provyd himself of ony uther advocat, not being of the nומר forsaid, that in caise the tyme of the calling of his matter, his principal advocat be in the inner-hous, that nevertheless the uther may be redie to disput the saime, before the ordinar in the utter-hous, and the excuis, (that the uther procurator is thair ben,) sal procure na delay, but present process sal be grantit: The names of quhilk fyftein advocattis appointit for the inner-hous followis; Mr. John Sharp; Mr. Thomas Craig; Mr. William Oliphant; Mr. John Nicolson; Mr. Alexander King; Mr. John Russell; Mr. Thomas Henderson; Mr. James Davidson; Mr. Robert Lintoun; Mr. Richard Spence; Mr. Henry Balfour; Mr. John Dempster; Mr. Oliver Colt; Mr. Robert Leirmouth; Mr. Lawrence Macgill.

*Delays.*

It is alleged by a number of witnesses, that the Judges in all the Six Courts have rolls or lists of causes to call over, unopposed motions to dispose of, and other matters of course, or of routine and form, which occupy a considerable daily period of the time of each Court, of which duties the Judges might easily be relieved, by transferring them partly to officers of Court, or to be settled by Counsel and Agents, or, if necessary, by a Judge in Court or at Chambers.

Your Committee would recommend that the Judges should be exempted from all these matters of form now done in Court, so that they may, as far as possible, devote the whole of their time to their proper judicial duties.

But the chief cause of the delays complained of, and the obstruction to business, especially in the all-important Courts of the Lords Ordinary, and with apparent good grounds, is the extraordinary fact, which has been before alluded to, of Six Courts sitting on the same days, and chiefly during the same hours, with not more than One leading Counsel for each Court, and not exceeding Thirty well-employed Counsel in all, to serve the whole of the Six Courts; while in practice, causes are very frequently delayed, postponed or stopped in one or other or all of these Courts, when any of the leading Counsel engaged in them are pleading at other bars,—an occurrence which must be frequent, when it is borne in mind that the attendance of Two leading Counsel is always necessary, which would require Twelve at the very least to serve the Six Courts, while at present there is, as the evidence clearly shows, not more than One-half of that number, if so many.

This is a state of things which ought not to be longer endured, and should be remedied with the least delay possible.

*Choice of Courts.*

A great deal of evidence has been given in favour of allowing suitors to choose the Lord Ordinary and Courts of Review before whom their cause is to be tried. This liberty, however, is questionable, on one ground, viz., the double advantage given to one party over another, for the party raising an action has the choice not only of the single Judge, but also the Court of Review his cause may be tried before, which evidently is unfair towards his opponent; yet, although in practice this choice has the effect of overloading some of those highly useful Judges most in favour with the public, and is accompanied with great delay, if not occasional injustice to suitors, so much has been said in its favour, that Your Committee are not prepared to recommend that it should be discontinued, but only that any plan which could be devised for removing the inconvenience would be attended with much public advantage, and should be adopted.

*Jury Trial.*

The whole evidence shows, that Jury Trial in Civil Suits is very expensive and highly unpopular, although the Criminal Law of Scotland is conducted with the aid of Juries with perfect success, and is in high estimation throughout the country, whether administered by the Judges of the Supreme Court or by the local Judges in every county.

Such is the import of the evidence taken; Your Committee abstain from further remarks, as it was not considered to be within their province to ascertain the causes of the extraordinary difficulty in working the principle of Jury Trial in Civil Suits in Scotland, which in England and Ireland is found easy and successful, and is justly considered the palladium of the liberties of the inhabitants of these countries.

*Jury Clerks.*

It appears, although Jury Trial in Civil Suits in Scotland is comparatively of rare occurrence, there are Two Principal Clerks and One Assistant Clerk, at high salaries, for framing the very few issues required for the business of the Court of Session.

Q. 218, 219, 220, 221, 222. 228. 427, 428, 429, 430, 431. 539. 597. 765. 872. 917. 950. 1298. 1406. 1674. 1685. 1768. 1818. 1889. 1940, 1941, 1942, 1943, 2119. 2121, 2122, 2123. 2184. 2187. 2242. 2369. 2856.

Q. 324. 230. 444. 598. 680. 871. 1335. 1406. 1504. 1710. 1810. 2084. 2184. 2214. 2415. 2534.

Q. 151. 153. 175. 1297. 1982. 2087.

Q. 120, 121, 122. 338. 703. 705. 726. 734. 738. 811. 829. 1140. 1382. 1614, 1615. 2685. 2743. 2826. 2883. 2885. 2891, 2892, 2893. 2899. 2903, 2904.

Q. 593, 594, 595. 1021. 1516. 1519.

It appears, also, that these Jury Clerks have selected the very busiest hour of the day for holding their Court,—for a Court it seems to be, within the walls of the Court of Session,—as they meet at twelve o'clock daily, and occupy Counsel and Agents at the hour when all the Six Courts, which also require the constant attendance of Counsel, are sitting.

Your Committee recommend a Rule of Court being made, fixing a more convenient hour for conducting business before the Jury Clerks, and that they should be enjoined to afford every other facility for encouraging this mode of trial, which unhappily is so expensive and unpopular in Scotland.

#### *Increase of Appeals to the House of Lords.*

Q. 130, 131. 143.  
151. 612. 1539.  
1592. 1805, 1806.  
1875. 1906. 1928.  
2255. 2261. 2752.  
2756.

It appears, notwithstanding the passing of the Judicature Act, having in view, among other reforms, to diminish Appeals from the Court of Session to the House of Lords, this desirable end has not been attained, as the following Returns from that House to Your Committee will show what an enormous proportion of the Causes appealed from all the Courts in the United Kingdom are from Scotland; a fact proving beyond contradiction the evident distrust which the Scotch nation has in the decisions pronounced by the highest legal tribunals in Scotland.

It further appears that Two Courts of Review, having in all respects the very same rank and co-ordinate jurisdiction, and sitting under the same roof, must by reason of the difference of opinions among the Judges in each Court, and the conflicting decisions consequently pronounced in these on cases nearly if not quite similar, tend strongly to encourage litigation and appeals to the House of Lords; and therefore, as one Court of Review must be more uniform in the judgments pronounced than two Courts can possibly be, it is the opinion of Your Committee, that one of the Inner Houses should be discontinued at the earliest period this can be accomplished, and that a fair trial should be given to a change so strongly recommended by respectable professional witnesses.

#### ACCOUNTS respecting APPEALS and WRITS of ERROR.

##### No. 1.

AN ACCOUNT of the Number of APPEALS Presented, Heard and Decided on, in each Session, from the 14th of March 1823 to the present time; distinguishing the Number of *Scotch, English, Irish and Welsh* in each Session respectively.

SESSION	Presented.					Heard.					Decided.				
	Scotch.	English.	Irish.	Welsh.	Total.	Scotch.	English.	Irish.	Welsh.	Total.	Scotch.	English.	Irish.	Welsh.	Total.
1823, from March 14th	28	7	3	—	38	8	5	3	—	16	8	3	3	—	14
1824 - - -	41	5	7	—	53	67	6	8	1	82	45	5	7	1	58
1825 - - -	35	15	8	—	58	64	10	9	1	84	55	10	9	—	74
1826 - - -	42	3	8	—	53	42	—	6	—	48	35	—	4	1	40
1826-27 - - -	57	14	9	—	80	26	12	10	—	48	21	9	7	—	37
1828 - - -	55	9	4	1	68	21	11	6	—	38	18	9	5	—	32
1829 - - -	39	7	1	—	47	18	2	4	—	24	17	3	2	—	5
1830 - - -	55	14	4	1	74	41	6	6	—	53	28	3	4	—	7
1830-31 - - -	38	6	1	—	45	43	4	3	—	50	37	3	3	—	43
1831 - - -	34	6	1	—	41	43	5	3	—	51	28	4	6	1	39
1831-32 - - -	51	16	9	—	76	19	11	—	—	30	17	4	—	—	21
1833 - - -	49	17	3	—	69	29	8	—	—	37	25	6	—	—	31
1834 - - -	31	4	6	—	41	7	22	6	—	35	14	24	6	—	44
1835 - - -	19	5	1	—	25	45	6	7	—	58	42	3	7	—	52
13th June 1836 - -	24	11	10	—	45	4	7	2	—	13	1	2	—	—	3
	598	139	75	2	813	477	115	73	2	667	391	88	63	3	500

No. 2.

AN ACCOUNT of the Number of WRITS of ERROR Presented, Non-pros'd, Heard and Decided on, in each Session, from the 14th of March 1823 to the present time ; distinguishing the Number of *Scotch*, *English* and *Irish* in each Session respectively.

SESSION	Presented.				Non-pros'd.				Heard.				Decided.			
	Scotch.	English.	Irish.	Total.	Scotch.	English.	Irish.	Total.	Scotch.	English.	Irish.	Total.	Scotch.	English.	Irish.	Tot l.
1823, from March 14th - - -	-	5	-	5	-	2	-	2	-	3	-	3	-	2	-	2
1824 - - -	-	9	1	10	-	2	-	2	-	9	-	9	-	6	-	6
1825 - - -	-	17	-	17	-	10	-	10	-	7	-	7	-	4	1	5
1826 - - -	-	6	1	7	-	1	1	2	2	3	1	6	-	2	-	2
1826-27 - - -	-	6	-	6	-	-	-	-	-	6	-	6	-	7	-	7
1828 - - -	-	11	1	12	-	-	-	-	-	5	1	6	-	4	1	5
1829 - - -	-	2	3	5	-	-	-	-	-	3	1	4	-	2	1	3
1830 - - -	-	3	4	7	-	1	-	1	-	5	-	5	-	4	-	4
1830-31 - - -	-	-	4	4	-	-	-	-	-	3	4	7	-	3	3	6
1831 - - -	-	-	-	-	-	-	-	-	-	3	-	3	-	2	-	2
1831-32 - - -	-	3	-	3	-	-	-	-	-	5	-	5	-	7	1	8
1833 - - -	-	2	-	2	-	-	-	-	-	1	-	1	-	4	-	4
1834 - - -	1	6	2	9	-	-	-	-	-	4	-	4	-	5	-	5
1835 - - -	-	2	-	2	-	-	-	-	-	5	-	5	-	6	-	6
13th June 1836 -	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	1	72	16	89	-	16	1	17	2	62	7	71	-	58	7	65

It thus appears that out of 813 Appeals from Scotland, England, Ireland and Wales, 598 of these were from Scotland alone, or very nearly three-fourths of the whole.

Judicature Act not fully complied with.

Continual references have been made by every witness respecting the passing and working of this noted statute in the Jurisprudence of Scotland.

The Judicature Act has now been about 15 years in operation, and yet, it would appear, that it still is very far from having been complied with, in its spirit at any rate, by the Judges of the Court of Session.

Among other of its grievous consequences, it has been proved, without any attempt at contradiction, that 2,000 cases, at the very least, at an expense of not less than 20*l.* each case, or 40,000*l.*, has been wrung from unfortunate litigants before the Court of Session, in settling disputed points of mere form arising out of this one Act of Parliament. It has not been shown to Your Committee, that any strong or effectual effort has been made to meet, by Rules of Court or Acts of Sederunt, the vexatious effects of such long-continued litigation on points of form; nor has it appeared that the Judges, who have large general powers to pass Acts of Sederunt, and have had these powers continued and confirmed by Parliament, for the express purpose "of regulating the forms of Court, from time to time," so as to prevent litigation, have ever stated to the Government, or the Lord Advocate of the day, the insufficiency of their powers to stay such proceedings, or the difficulties which arose out of this Act of Parliament, and the propriety or necessity of having their powers enlarged, or the Act explained or amended by another statute.

It is asserted, that suitors cannot be made to see the justice of having to pay for the settling of forms of process, or disputed points of law, while the merits of their cases to be tried under that law were suffered to remain unheard and undecided. It has been stated confidently by several witnesses that the settling of these 2,000 cases, and the many more alleged to have accrued out of other similar formal or doubtful points, has relieved the Judges of a great deal of labour and time occupied in the decision of those now settled; consequently there is so much less to do, and it may be inferred that fewer Judges could perform the duty.

It appears that the main intention of the Judicature Act was to substitute, as far as possible, parole pleadings for those in manuscript and in print, but that the force of habit, or prejudice, or other causes, have stood in the way of the accomplishment of this; and that masses of written and printed pleadings have been in use since the Judicature Act was passed, and

Q. 31. 45. 103. 214.  
299. 328. 1264. 1416.  
1442. 1537. 1742. 1928.  
2433. 2439. 2449. 2590.  
2713. 2731. 2782. 2812.

Q. 1034, 1035.  
1038. 2856.



and that the Judges, even up to the present time, trust more to these printed papers than to pleadings of counsel and parole procedure, than was either intended by the Legislature, or wished for by parties or the profession, or has proved satisfactory to the public.

"Cases."  
Q. 43. 618. 622.  
1531. 1551. 1736.  
2074. 2615.

It further appears, that so strong is the force of professional habit, even with Judges of high acquirements, as to induce a resort to a mode of procuring argumentative pleadings to be laid before them in a printed form, technically called "CASES," although the letter as well as the spirit of the Judicature Act are opposed to such a practice, which, being expensive and dilatory, must tend to add to the feeling abroad against the Court.

These things have caused great dissatisfaction, which it is believed might have been prevented by more frequent revisions of the Acts of Sederunt applicable to that Statute, which has been suffered for so many years to harass those seeking justice in disputes between each other, with the settlement of questions foreign to their interests, and arising out of dubious or careless legislation, or rules of Court, or both combined, which private parties cannot be made believe they had any right to be engaged in or suffer for.

Having this in evidence, and knowing the large general powers which are entrusted to the Court of Session, Your Committee strongly recommend that, in future, doubtful points should be settled without loss of time by Act of Sederunt, or, where that cannot be, that they should be annually reported to Parliament by the Judges, as Acts of Sederunt are, or be brought in some form or other under the cognizance of the Legislature, in order to obtain their adjustment, without imposing on suitors such expense and vexation as has been the case for the last fifteen years in the Court of Session.

#### *Acts of Sederunt.*

The powers which have been conferred by Acts of Parliament, or been exercised as a right, by the Court of Session, to frame what are technically called Acts of Sederunt, for the regulation and good government of their own Court, and every other Law Court in Scotland, are but too well known to the people of that country; and it will not be denied, that to the possession and the exercise of these powers, much of the dissatisfaction which exists with the proceedings of the Court of Session is attributed; and it will be admitted, that the possession of such general and extensive powers is very dangerous, unless they are applied with regularity and discretion, and are wisely administered.

Q. 104. 375. 380,  
381. 408. 561.  
566. 573. 595.  
630. 632. 713.  
1009. 1038. 1063,  
1064. 1065. 1066.  
1073. 1085. 1088,  
1089. 1090. 1747.  
1777. 1786. 1822.  
1825. 1891. 1918.  
1926. 2847. 2848.  
2852. 2853. 2856.

These Acts of Sederunt have been more or less referred to or commented on by every witness, some being in favour of them to the fullest extent, and others less so. Of one thing is no doubt, from the testimony given to Your Committee, and it is highly important, which is, that these Acts, although they are of several hundred years' standing and very voluminous, have never been regularly revised or repealed as occasion required, but have been added to from time to time, and allowed to become obsolete or go into disuse, in part sometimes, and entirely at others, without repeal or declaration, or any formal notification to the profession or the public, from the Court which framed them. In proof of this most extraordinary fact, The House is referred to the application made some years ago by the House of Lords for a correct copy of the Acts of Sederunt, and the reason assigned by the Judges of the Court of Session for their inability to comply with so proper a request. [The Document alluded to follows.]

These are facts deserving of the most deliberate consideration, with a view to the immediate revision of the Acts of Sederunt by the Court itself, thereby to insure its future popularity and greater usefulness; for it will no longer be doubted, that the uncertainty as to whether these Acts were in force or disuse, have led to a great deal of unprofitable and vexatious litigation, as they must continue to do, until the rules and forms of Court these Acts were intended to regulate and settle shall in reality be properly fixed.

It is here of importance to observe, that it appears by the following extract from a Bill introduced into the House of Commons in 1785, by the late Sir Ilay Campbell, that previous to that time the Court of Session must have been in the habit of meeting for the space of a fortnight immediately after the Summer Session, in order to revise the forms of procedure, and to regulate these forms by Act of Sederunt; the clause is as follows: "And be it Enacted, by the authority aforesaid, that the Judges of the Court of Session *shall continue to meet for the space of a fortnight in the next autumn vacation, immediately after the Summer Session, in order to revise the forms of proceeding in the said Court, and by an Act or Acts of Sederunt to regulate the said forms*, and particularly to adapt them to the change which the diminution of the number of Judges will occasion, and thereafter, from time to time, as occasion may require, to adjust and regulate the said forms by similar Acts of Sederunt of the Court."

It is an undeniable fact, that suitors before the Court of Session, and the public generally, have for many years past complained much of the doubtful and faulty state of the Acts of Sederunt; and by looking at the harassing effects produced by the Judicature Act alone, as in evidence before Your Committee, and bearing in mind that nothing can be more unjustifiable than litigation at the expense of private parties in order to settle Rules of Court or points of form, Your Committee earnestly recommend, that at the end of every Summer Session the good old practice shall be restored, and that a revision of the Acts of Sederunt shall take place, whereby dubious and disputed points may be distinctly settled and laid down, by the same tribunal which framed and sanctioned Acts, for the import and accuracy of which it is clear the Judges are responsible to the public.

*As to the Acts of Sederunt.*

REPORT of the JUDGES of the COURT of SESSION to the HOUSE of LORDS, 27 February 1810.

(Referred to in the Evidence of Mr. *William Alexander*, W.S., before the Select Committee of the House of Commons on the Supreme Courts of Scotland, on 25 March 1840.)

REPORT of the LORDS of COUNCIL and SESSION in *Scotland*, most humbly offered in answer to an Order of the Right honourable the Lords Spiritual and Temporal, in Parliament assembled.

THE following Order, having been received by the Judges in Scotland at the close of the summer session, in July 1808, was recorded in their books:—

“ Die Martis, 28 Junii 1808.

“ Ordered by the Lords Spiritual and Temporal, in Parliament assembled, That the Lords of Session do prepare and submit to this House copies of all acts of sederunt now in force, distinguishing those which, strictly speaking, are rules of court, and prescribe forms of proceeding, from those that explain or in any way affect the law of the land.”

As it became necessary to adjourn the further consideration of this Order till a subsequent meeting of the court after the autumn vacation, the then Lord President, at the desire of the other Judges, undertook the business of preparing materials for making the report; but his lordship soon after retired from the office; and the attention of the Judges having since been occupied by the important alterations made on the constitution of the court, and the arrangements which were thereby made necessary, besides the labour of bringing up the ordinary business of the court, which had fallen greatly in arrear, it was not in their power till very lately to resume consideration of the Order from the House of Lords; and they now humbly make their report in obedience thereto as follows:

The acts of sederunt of the Court of Session, under which name is comprehended every act, regulation or proceeding which the court has appointed to be recorded in the books of sederunt, have been gradually accumulating for the space of near three centuries, since the first institution of the court in 1532, and are now very numerous. In 1790 a compilation of the whole was made out from the original record by Mr. William Pait, a member of the Faculty of Advocates, under the authority of the court, and published, in one volume, in folio, containing 644 pages. This printed volume we believe to contain an accurate and authentic copy of the whole acts of sederunt, so far as it goes, and as such it is quoted and referred to in the daily practice of the court. The only defects of it, so far as we know, are what arose from the imperfect state of the record at the time of publication. The books of sederunt for the first 20 years after the institution of the court had long ago disappeared, and were supposed to be lost. But we understand that this part of the record has been lately discovered in the General Register House; and that steps have been taken, by order of the Lord Clerk Register, for making out a correct copy thereof, which, from the bad condition of the manuscript, is stated to be a work of considerable difficulty. Another volume of the record was and still is wanting, containing the acts of sederunt from 19 June 1605 to 2 November 1626. During this period we know that several acts of sederunt were made, particularly one of great importance with regard to *dyvours* and *bankrupts*, which was afterwards confirmed by the Parliament of Scotland, “as a necessary and profitable law,” and which, accordingly, appears *verbatim* in our statute book. There are also copies extant of other acts of sederunt at this time, which, however, in our opinion, cannot be relied upon as absolutely accurate and authentic.

By the above Order, which it is our inclination as well as our duty to comply with in the fullest manner, so far as lies within our power, we are required “to prepare and transmit to the House of Lords copies of all acts of sederunt now in force;” the import of which we conceive to be, that we shall prepare and transmit copies of the whole acts of sederunt which have been made since the institution of the court, excepting only those particular acts which have ceased to be in force by being repealed or otherwise. The first and most essential part, therefore, of the duty laid upon us is to examine attentively the whole acts of sederunt from first to last, and to ascertain with precision what particular acts, or parts thereof, have been repealed, altered or abrogated by disuse. And with regard to this part of the business, we beg leave to represent, 1st, That when successive acts of sederunt have been made by the court with respect to the same or similar subjects (which has happened very frequently), it has not been the practice of the court to insert in the new act any express repeal of the former acts, which were thereby meant to be altered, in whole or in part: so that, in order to distinguish accurately betwixt the acts of sederunt which are now in force, and those which have ceased to be in force, in whole or in part, it would be necessary to examine every one act of sederunt, and to compare it with all the prior acts, in order to determine how far the regulations of the one are, in whole or in part, inconsistent with all the prior ones relative to the same subject; and what adds to the difficulty of such an examination is, that the acts of sederunt frequently contain regulations and orders with respect to matters which have very little connexion with one another; so that even the examining and comparing all the acts relating to one matter would not answer the purpose. In order to attain to perfect accuracy, it would be necessary to examine every one act through all its different regulations, numerous as they are, to compare it with all the other acts, and to consider its operation upon such as are prior in date, and how far the one is inconsistent with the other, so as to have the effect of a virtual repeal or alteration thereof; and this, we are satisfied, would be a work of much more time and labour than it is possible for the judges of this court to accomplish consistently with the execution of their important duty as judges.

2dly. We must further observe, that by the law of Scotland even Acts of Parliament before the Union were held to lose their force by *disuse*, without any express repeal, or to go into desuetude, as it was termed; and the same is still understood to be the case with regard to the acts of sederunt: so that besides an examination of the whole acts of sederunt in the books of sederunt, in order to fulfil the Order of the House of Lords, it would be necessary to enter upon an extensive investigation with respect to the practice for many years past, through all the different departments of business

business belonging to the court, in order to ascertain what acts of sederunt or parts thereof were in desuetude, and in that way had ceased to be regulations in force. We know that in deciding causes which turn upon the construction of our statute law, it is sometimes a matter of considerable difficulty to determine whether a particular Act of the Parliament of Scotland has or has not gone into desuetude. But were we required to make a general report upon the statute book of Scotland, and to distinguish every one law which is in desuetude from those which are not, we should find ourselves nearly as much at a loss how to make our report as in the present case.

The Order further requires us to distinguish those acts of sederunt "which, strictly speaking, are rules of court, and prescribe forms of proceeding, from those that explain or in any way affect the law of the land."

The acts of sederunt which come under this last description appear to be of two different kinds; 1st, Acts which either have altered or made additions to the law of Scotland existing at the time, which was the province of the legislature; and, 2d, Those which were explanatory of what the judges considered to be the law, and which were appointed to be recorded in the books of sederunt by way of notification to the lieges.

With regard to acts of this first class, we observe that a practice at one time prevailed, that when any act affecting the general law was made by the Court of Session, such Act was afterwards taken under consideration of the legislature, and, if approved of, was ratified by an Act of Parliament. Thus we find in our statute book the following Acts of the Scots Parliament, proceeding upon and confirming acts of sederunt which had previously passed through the Court of Session: Act 1559, cap. 75, intituled, "For punishment of persons that contemptently remains rebels, and at the King's horn." Act 1594, cap. 138, intituled, "An Act anent slaughter and trouble made by parties in pursuit of their actions." And Act 1621, cap. 18, a ratification of the Acts of the Lords of Council and Session made in July (1618), against unlawful dispositions and alienations made by dyvours and bankrupts. But the acts of sederunt which are referred to in the above Acts of Parliament, and which are thereby confirmed, from the imperfect state of our records, are not to be found in any of the books of sederunt which are in the hands of the proper officer of court.

But there are other acts belonging to the above class, and which, in our opinion, required the authority of the legislature in order to give them force, which, so far as we know, never were confirmed by Parliament. Of this nature is an act of sederunt, bearing date 28 February 1662, intituled, "Act anent Executors, Creditors," which certainly made a considerable alteration upon the common law of Scotland, by introducing a more fair and equal mode of attaching the moveable or personal estate of a person deceased, which formerly stood upon a very imperfect footing, and was much complained of; and, accordingly, although this act never was ratified by Parliament, it has been universally followed out in practice by every court of law in this country, and has long been considered as a part of the established law of Scotland.

To this class also belong two acts of sederunt, by which the Court of Session attempted in vain to remedy the imperfection of the common law of Scotland with respect to bankruptcy, the rules of which were so imperfect as to put it in the power of a creditor who lived in the neighbourhood, or who was anywise connected with the bankrupt, to secure to himself a preference upon the funds by using the form of legal diligence to the exclusion of all the other creditors who had not the same advantage. One of these acts bears date 29 July 1735, intituled, "Act for the security of Creditors and better management of the estates of Bankrupts and others;" and the other is dated 10 August 1754, "Act of Sederunt anent poindings and arrestments;" both these Acts were temporary, being declared to endure only for three years, and they never were renewed, which we presume must have arisen from a conviction in the minds of the judges, who then sat in the court, that these acts were beyond their powers, and related to matters which properly belonged to the legislature. And accordingly, at a subsequent period, the evils which the court had attempted to remedy drew the attention of the legislature, and were remedied by the Act 12 Geo. 3, cap. 72, intituled, "An Act for rendering the payment of the Creditors of Insolvent Debtors more equal and expeditious, &c. in that part of Great Britain called Scotland;" and by successive statutes afterwards enacted, which now compose the system of bankrupt law in Scotland.

The other class which we have mentioned above is that of acts of sederunt, which, although they touch upon general matters of law, may be considered merely as expressing the opinion of the court with respect to some article or branch of the law existing at the time. And of this kind, the one which seems to merit most attention is an act of sederunt, bearing date 14 December 1756, intituled, "Act of Sederunt anent removing." Besides some regulations concerning the form of procedure in actions of removing, this act contains also some matters respecting the general law concerning leases and removings. But whether these are not warranted by the principles of law previously acknowledged, and by a series of precedents and decisions of the court, appears to us at least a very questionable point; and that being the case, we do not consider it to be requisite or proper to make a more particular report upon this subject, as this could not be done without our forming and delivering our opinion upon some very general and difficult questions of the law of Scotland, which we presume it was not meant that we should attempt to do, without having any particular case before us, and without the advantage of having the case discussed, and the precedents and authorities upon the subject brought under our review, by the pleadings of counsel, as in ordinary causes. But we know that the law, as laid down or explained by this act, has been found by experience to be of considerable service to the country.

The acts of sederunt which have been made since this last-mentioned act in 1756, appear to us to contain only such regulations as were within the power conferred upon the court by its original constitution, or were authorized by statute.

We cannot conclude this report without expressing how much we are sensible of its imperfection, and that it has not fulfilled the precise terms of the Order received by us so completely as it was our earnest inclination to do. But we have endeavoured to assign the reasons of that imperfection; and we trust that these will be considered with indulgence by the most Honourable House, and received as a reasonable apology on our part.

From

From the above it is shown that in Scotland the laws are administered under voluminous Acts of Sederunt, framed by the Judges of the Court of Session for the time being, which have been accumulating for more than 300 years. Some of these are in disuse, some partly in disuse, some so mixed up with other matters as to be very difficult to comprehend; some enact laws, while others have amended laws which had been passed by the Legislature; some are in force entirely, while others are only partly in force; and yet it appears, under the authority of a Report from the Judges, so far back as the year 1810, that this state of confusion existed then, as it does now, and that this has been allowed to continue deliberately, so that the Acts of Sederunt are still unrevised, and consequently few, if any, have been compared, explained or repealed, during the whole period of their accumulation, namely, from 1532 to the present time.

If these facts do not show the necessity for a thorough revision, and effectual change from the present system of administering the law, as has been so strongly recommended by that distinguished lawyer in the University of Edinburgh, Professor Bell, it will be needless to look for other means of conviction. The following is an extract from his evidence:—Ques. 2710. “Did not your answer imply that there ought to be an entire change in the system of administering justice in Scotland?—I think so.” Ques. 2711. “Are you prepared to leave the Committee with that impression, that you think there ought to be a fundamental change in the system of administering justice in the Supreme Court of Scotland?—A change in the mode of proceeding there ought to be.”

#### *High Court of Justiciary.*—[See Returns.]

The Judges of the High Court of Justiciary, being Six only out of Thirteen, hold Assizes in Spring and Autumn in Nine towns only in all Scotland; and by looking at the short time occupied with the amount of business which comes before them in all these towns, with the exception of Glasgow, and seeing that little or no Civil business is done on Scotch circuits, The House will judge of the extent and nature of Assizes in Scotland. In Glasgow there is an additional circuit in Winter. It is proper also to remark, that the Judges are not bound to remain in each town until they make a gaol delivery, but to devote three days only to criminal business whether the trials are concluded or not, although their expenses, when on circuit, are paid out of the Exchequer; and, in point of fact, prisoners have often been left untried, or been, after a continued imprisonment, made over to be tried by the Local Judge of the county they belonged to, which Judge might far better have tried them at first, for Scotland has to boast of excellent Stipendiary Magistrates in every county.—[See Return to the House of Commons of the Assizes at Glasgow, No. 257, of Session 1840.]

Q. 58. 68. 159, 160.  
1227. 1229. 2550.  
2553. 2777. 2864.  
2871, 2872, 2873.  
2890, 2891, 2892,  
2893, 2894, 2895,  
2896, 2897. 2899.  
2902, 2903, 2904,  
2905, 2906, 2907,  
2908, 2909, 2910,  
2911, 2912.

It is in evidence that some of the Lords Ordinary are included in the number of Judges who officiate in the High Court of Justiciary, which considering the extent of duty imposed on them as Lords Ordinary, seems to be harassing Judges unnecessarily, who have so much business as to cause heavy arrears in their own courts; therefore it appears to Your Committee that none of the Lords Ordinary should sit in the High Court of Justiciary.

#### *Exchequer Court.*

In the Court of Exchequer, as in the Court of Justiciary, some of the Lords Ordinary are engaged. Lord Cuninghame, who in the last Session has had 667 causes taken into the Court he presides over, out of the whole number of 1,801, which were brought into Courts of the Five Lords Ordinary, and Lord Jeffery, who has had 408 causes out of the remainder, thus leaving only 726 causes for the three other Judges, have had the duty of the Exchequer added to the load of business, which, as popular Judges, has been thrown upon them through the choice of suitors.—[See Appendix.]

Q. 59. 82. 639.  
2771. 2773, 2774.  
2777.

The arrears in the Courts of these highly useful Judges need be no matter of surprise, when it is seen that although they can by no exercise of talents or labour overcome their proper tasks during the short period of the year which is allotted to their duties, some of them have been subjected to serve in two other Courts; while the Judges of the Inner Chambers, by sitting from two to three hours only, have no arrears of business, and having also longer vacations than the Lords Ordinary, Your Committee think they might relieve the Lords Ordinary from the duty of the Exchequer, as well as that of the Justiciary.

#### *Courts to meet on alternate Days.*

It has been suggested, and is well worthy of consideration, in order to accommodate counsel and forward business, while two Courts of Review shall be continued, that these Courts should not sit, as at present, on the same days, but that each Court should meet on alternate days in each week, and continue their sittings for six hours daily; and that a sufficient number of causes shall in future be set down for trial on the daily roll or list, in place of two or three only, as at present.

Q. 697. 1843. 2184.  
2399. 2406, 2407.

It has likewise been suggested that the Outer House Judges should also sit on alternate days of the week, and that by thus holding their Courts and sitting six hours daily, the business would proceed without much interruption from the absence of Counsel; this would afford the manifest advantage of these Judges, and those of the Inner Chamber, having an

intervening day to study at home: Your Committee are of opinion that this also is worthy of a fair trial, as such an arrangement would certainly alleviate or cure the evils arising from absent Counsel.

*Court Halls of the Lords Ordinary.*

The above plan would also afford an opportunity of providing, at a comparatively small expense, proper and commodious Courts for the Lords Ordinary, in place of the small, inconvenient and exposed places they occupy at present, to the great detriment of the public, the suitors and the bar, as specially set forth by Professor Bell and others.

*No Courts held on Monday.*

Q. 80. 479. 669.  
674. 832. 1230.  
2746.

Neither of the Inner Chambers, nor any of the Lords Ordinary, sit on Mondays, for which no other reason has been assigned than that of enabling the Judges to study their papers; but now there is no such reason or pretext.

It therefore appears to Your Committee that this practice should be discontinued, and that the Inner and Outer House Judges should hold their Courts every day in the week, either consecutively or alternately; to which there is no objection, except the occasional sittings of the Court of Justiciary,—the duties of which would be well performed by the whole Judges of the Inner Houses, or by one or other of the Divisions in rotation,—requiring only the attendance of one or two Judges for one day probably in each fortnight; which day should be so arranged as not to interfere with the Judges holding three Courts weekly for civil business in each of the Inner Houses.

*Uniformity of Decisions.*

Q. 513. 1672. 1745.  
1845. 1887. 1892.  
2257. 2412. 2752.

The consolidation of the two Inner Chambers into one has been earnestly urged with a view to secure uniformity of decisions, which evidently would be more likely with one Court of Review than it possibly can with two; and therefore Your Committee recommend the serious consideration of this important alteration, in addition to the others, which have been suggested elsewhere in favour of one Court.

*Vacations.*—[See TABLE, p. xxv.]

These consist of three weeks at Christmas, two months in spring, and four months in summer, which last is called the Long Vacation.

The length and frequency of these vacations evidently leads to the delays complained of, the delays enhance the expense, and both together assuredly must have a large share in creating dissatisfaction.

The length and frequency of the vacations must also tend materially to unsettle the minds of the Judges from that calm and regular system of professional study and business, so essentially requisite for the due performance of the judicial function; and, however desirous they may be to discharge their duties properly, few will doubt that the return to these at the end of a two and a four months' vacation, is much more irksome than if their duties were continuously spread over the greater portion of the year, as are those of all other Judges. Supposing, however, these apprehensions to be more or less fallacious, will it be doubted that those seeking justice in the Supreme Courts, and who see the Judges, with ample yearly salaries for the faithful discharge of the high trust reposed in them, vacating their chairs for two months in spring, and four months in summer and autumn, while large arrears of business are allowed to stand over, can view this as any thing else than trifling with their vested rights, and a positive denial of justice?

Q. 487. 488. 500.  
599. 655. 917.  
1151. 1815. 1818.  
2417.

It is admitted by most of the witnesses that the sessions should be lengthened, in order to afford ample time for doing the business of the country calmly and in a deliberate manner; and the great length of the Long Vacation has been especially alluded to, as being one means of enhancing the cost of litigation, and creating and maintaining the feeling of dissatisfaction, which has been spoken of by every witness as existing in a greater or less degree.

It has been alleged by one or two of the Counsel, that increasing the sessions and diminishing the vacations would have the effect of overworking the Judges, and would deprive them of the opportunities they now enjoy of relaxation from their arduous duties, and having ample time allowed for the improvement of their minds.

The members of the Scotch bar who have been examined, it will be observed, see no occasion for shortening the present vacations, or extending the daily sittings of the Courts.

On the other hand, the Writers to the Signet and Solicitors, who practise in the same Courts, are of opinion that the daily sittings should be lengthened, and that the vacations should be abridged, thus showing it to be their opinion that the Suitors have quite as good a claim to consideration as the Judges.

When, however, the disproportionate quantity of business which is gone through by the English Judges, as compared with that in the Court of Session, is borne in mind, and the short daily sittings and length of vacations of the Scotch Judges, as compared with those of the Judges in England, are taken into account, and the relief from wading through the mass of printed papers, to which the Scotch Judges were formerly subjected, is considered, the force and value of these opinions may easily be arrived at by The House.

*Sessions*

*Sessions and Vacations of Outer House.*

SESSIONS.				VACATIONS.			
Meet on	Rise on	Number of Days.	Court, however, sits only Four Days in the Week, which leaves	From	To	Days.	—
1 Nov. -	19 Dec. -	48	28	19 Dec. -	14 Jan. -	26	Christmas Recess.
14 Jan. -	20 March	65	39	20 March	20 May -	61	
20 May -	20 July -	61	36	20 July -	1 Nov. -	104	
		174 or nearly 6 calendar Months.	103 or nearly 3½ calendar Months.			191 or more than 6 calendar Months, besides several Holidays during Sessions.	

*Sessions and Vacations of Inner Houses.*

SESSIONS.				VACATIONS.			
Meet on	Rise on	Number of Days.	Courts, however, sit only Five Days in the Week, which leaves	From	To	Days.	—
12 Nov. -	19 Dec. -	37	28	19 Dec. -	14 Jan. -	26	Christmas Recess.
14 Jan. -	11 March	56	41	11 March	20 May -	70	
20 May -	20 July -	61	44	20 July -	12 Nov. -	115	
		154 or more than 5 calendar Months.	113 or nearly 4 calendar Months.			211 or 7 calendar Months, besides several Holidays during Sessions.	

It thus appears,—

1st. That the length of the Vacations of the Inner House Judges greatly exceed their Sessions.

2d. That the Vacations of the Outer House Judges also exceed their Sessions.

3d. That the Inner House Judges sit on Five days in the week.

4th. That the Outer House Judges sit on Four days only.

5th. That the actual Court days of the Inner House Judges in the year are only 113 out of 365.

6th. That the actual Court days of the Outer House Judges in the year are only 103 out of 365.

7th. That the arrears of the Outer House Judges may be partly if not wholly ascribed to the fact of their only sitting Four days in the week, and Four hours daily, and their being actually occupied fewer days by 10 in the year than the Inner House Judges, to the lightness of whose duties such frequent allusion has been made.

*Business during Vacations.*

Q. 942. 1150.

The members of the several branches of the learned profession differ widely on this point, and are unfavourable to or decidedly in favour of an alteration in the business which under the present rules of Court may be done in vacation. Members of the Bar are generally against any change, while the Writers to the Signet and Solicitors insist, and apparently with good reason, that the business should be moved forward during vacations through certain stages not permitted at present, the want of which, they say, is one great cause of delay and prejudice to the suitor, especially during the long summer vacation of four months.

*Evidence formerly given.*

Q. 424. 1647. 1728.

Frequent allusion has been made by the majority of the witnesses before this Committee to the evidence given by certain witnesses who appeared before the Select Committee on Judges' Salaries in 1834, and before the Scotch Law Commissioners in the years 1834 and 1835, which is in conformity with theirs, and points strongly to the necessity of adopting the alterations and improvements which have been recommended to Your Committee; who beg to remark, that similar opinions have been no less strongly expressed to the Committee and Commission alluded to above, in the testimony given by Advocates at the Scotch Bar and Writers to the Signet, to whose evidence no particular allusion has been made by the witnesses who appeared before this Committee.—(See Note of the names of these at foot.)\*

Thus the testimony given so far back as 1834 and 1835 is no less concurrent and powerful against the present system of administering justice, than it is strengthened by additional witnesses of high respectability in favour of the changes now recommended, and evidently the more necessary, as the demand for them existed no less strongly a considerable number of years ago, than it has been in the past and present declining state of the Court of Session. In fact, the numerous Reports from Commissioners and Committees from the year 1816 downwards, as well as the many Returns which have been made periodically and annually to Parliament, will all show the length of time during which it has been attempted to improve the Scotch Courts,—with what success Returns to Parliament and the evidence before Your Committee will make apparent.

*Decrease in the Number of Judges proposed in 1785.*

Q. 1177.

It appears that the then Lord Advocate, afterwards one of the most distinguished Lords President who ever presided over the Court of Session, namely, Sir Ilay Campbell, brought a Bill into the House of Commons in the year 1785 for diminishing the number of Judges. A copy of the Bill will be found in the Appendix. The number proposed, as is usual in Bills, is not filled up, but evidence not to be doubted can be adduced, that the reduction intended was from Fifteen Judges to Ten; of this fact circumstantial evidence was offered to Your Committee, but was rejected. It however can be easily proved, and it remains for The House to decide, whether the intention of the Lord Advocate in 1785 is not well worthy of deliberate consideration, with the view of reducing the present number of Judges from Thirteen to Ten, should that appear a preferable number to Nine, as has been proposed. Those who have recommended a reduction in the number of Judges from Thirteen to Nine, have all, with one exception, concurred in the opinion, that one Court of Review, having Four Judges in it, with Five Judges acting as Lords Ordinary, should be the apportionment and the strength of the Court of Session. On the other hand, two of the witnesses examined are in favour of Five Judges as a Court of Review, or Ten in all, being the precise number proposed in 1785.

Were the number, therefore, to be reduced from Thirteen to Ten, the generally approved number of Four might form the Court of Review. Six Lords Ordinary, if required, might officiate either as fixed Lords Ordinary or in rotation, affecting the whole Ten Judges, by which method one of the Lords Ordinary could at any time be called into the Court of Review, so as to make that Court consist of Five, and thereby ensure a decision by a majority of votes of not less than Three to Two in any case, which is the mode pointed out by almost all the witnesses, as being preferable to any other. It therefore appears that so long back as 1785, when the amount of business in the Court of Session, as Returns to Parliament and to Commissions or Committees show, was much greater than it is at present, the Lord Advocate of that day not only saw no difficulty in reducing the number of Judges, but introduced a Bill to effect that purpose.

*One Division as a Court of Review sufficient.**Against.*

Q. 73. 204. 685.  
1284. 1312. 1450.  
2435. 2623. 2661.  
2751. 2757. 2764.  
2808. 2858.

It appears from all the evidence, and is worthy of the greatest attention, that not more than two or three causes are set down daily for trial before the Judges of the Two Inner Houses; and the Returns will show that the causes decided in these courts correspond to the small number which are placed on the daily rolls or lists; and thus prove clearly, as one

\* Patrick Shaw, Esq.; Alexander Dunlop, Esq.; Joseph Murray, Esq.; J. Campbell, Esq.; A. G. Ellis, Esq.; John Marshall, Esq.; T. G. Wright, Esq.; Peter Campbell, Esq.



For.

one very intelligent witness, Mr. John Hunter, has well expressed it, that they, (the Judges), "appear to have some difficulty in spreading out the business, so as to embrace the whole period of the Session;" thus making it evident, that the short hours of sitting, and the few causes set down for trial, are made to correspond with the short time the Court actually sits: this single fact should go far to prove, that one Court, if properly constituted and conducted, would be sufficient to perform the duties which occupy two at present. Rather than enter, however, into considerable detail respecting the discontinuance of one of the Inner Houses, and having but one Court of Review, Your Committee consider it better to refer The House to the evidence in favour of this proposal, which will be found as strong and conclusive as any thing well can be, short of an actual trial of the plan; which Your Committee submit should be made, whenever the requisite preparatory steps pointed out shall have been taken.

#### *Number of Judges required.*

A great deal of evidence has been taken respecting the number of Judges required to perform the present duties of the Court of Session, and very opposite opinions have been stated on this most important point of the inquiry entrusted to Your Committee.

If the history of the Court of Session is examined, it will be found that the number of Judges of which it has been composed has differed considerably.

At one time there were Nineteen Judges in all; these were diminished to Fifteen, at which number it stood for a great many years, and until reduced to the present number of Thirteen.

It may very properly be asked, which of these numbers gave most satisfaction to the country; and the reply will be, there was no difference; for the truth is, that the Court has at all times been unpopular.

Whether the Court consisted of Nineteen, Fifteen or Thirteen, Acts of Sederunt have been passed, altered and amended; but have never been systematically revised, explained, consolidated or repealed, as was the evident duty of the Bench.

Again, it may be asked, whether this neglect of a most important duty arose from want of time; the answer must be in the negative; for the duration of the Sessions has never equalled the length of the vacations; nor does it appear that the Judges, whether Fifteen or Thirteen in number, have "*continued to meet for the space of a fortnight in the autumn vacation, in order to revise the forms of proceeding in the said Court, and by an Act or Acts of Sederunt to regulate the said forms.*" What has occasioned so palpable a neglect of this most vital duty, which the mass of confusion the Acts of Sederunt exhibit clearly proves to have taken place, Your Committee have not ascertained.

The Counsel who have been examined before the Committee all agree that the present number of Thirteen Judges should not be diminished.

The Writers to the Signet and Solicitors generally allege the contrary.

Of Writers to the Signet and Solicitors, Six have been examined by Your Committee; of these, Four have declared, in decisive terms, their conviction of the propriety of diminishing the number of Judges from Thirteen to Nine, and abolishing one of the Inner Chambers, provided the forms of practice shall be better defined and regulated, which all the Six agree may very easily be done; and that increased daily hours of sitting and the length of sessions requisite should be provided for.

The supporters of this plan have given their reasons at great length to Your Committee, to which The House is referred; and they have uniformly adhered to their opinions, and to the reasons upon which these have been founded, although ably examined at great length to test their value.

On the other hand, the Counsel, as is quite natural, have unanimously declared their belief in the propriety of continuing the present number of Thirteen Judges and Two Courts of Review, alleging there is ample employment for all of them; but they have not referred to Returns or produced calculations in support of this opinion. They also think that the sessions or daily sittings do not require to be lengthened; and, in short, have said explicitly, that the main, if not the only, improvement of which the Courts and the practice therein is susceptible, is a more patient and ample hearing of Counsel before the Inner Chambers.

The Writers to the Signet and Solicitors also agree in the necessity of ample discussion in the Inner Houses; but they allege that the delays and expense of the Court of Session practice, with the late improvements, and greater cheapness of obtaining justice in the Sheriff or County Courts, and the manner in which Counsel absent themselves when causes are in progress, are the main reasons of the decrease of business and increasing dissatisfaction with the Court of Session.

For it is in evidence, that such are the delays, and such is the expense, in the Court of Session, that disputes amounting to Twenty, Thirty or Forty Pounds, will have been managed with great economy and expedition, if terminated in Two years, at a cost on an average of Fifty or Sixty Pounds to parties.

It is proper to state, that the cases here alluded to are quite distinct from those which private parties have been involved in, to settle doubtful or disputed points in Acts of Parliament, Acts of Sederunt, or Rules of Court.



The preponderating weight of evidence is in favour of continuing the present number of Judges, while, at the same time, there has been a mass of testimony in favour of a reduction, elicited from witnesses who have been engaged for many years in the daily practice of the Courts, and who have no personal interest in the number of Judges and therefore their opinions are worthy of the most careful consideration.

These opinions have been gravely stated and ably maintained; and it is for The House to decide on their value and importance, with a view to future arrangements.

However great the discrepancy may be with respect to the evidence offered on this important part of the inquiry, it has given Your Committee the greatest satisfaction to find that no witness has in the slightest degree glanced at, and far less impugned, the integrity of any of the Judges; *for it is neither the Law nor its propounders which they allege to be faulty, but the SYSTEM and PRACTICE of the Courts.*

With a view to improve the rules and forms of Court, to relieve the Judges of every duty not strictly judicial, to provide against the present obstructions to business, to procure extended daily and sessional sittings, and a more strict compliance with the recommendations of former Commissioners and Committees on these points, it appears to be imperative that measures should be adopted with the least possible delay, in order to accomplish improvements so evidently necessary for removing the already formed and growing dissatisfaction and distrust with the most valuable institution of every country, viz. its Judicial Establishment.

Q. 863. 1362.

1673. 1828 1880.

1900, 1901.

Your Committee is therefore of opinion, that it will not be advisable to diminish the number of Judges, until the suggestions and recommendations to be found in former Reports and in this Report have been adopted; when this shall have been effected, Your Committee confidently anticipate that the present number of Judges may be diminished from Thirteen to Nine, with one Court of Review only, thereby ensuring to Scotland the uniformity of decisions which one Court of Review would afford, and which probably would be attended with a large decrease in the number of Appeals to the House of Lords, and a saving to the country of not less than 18,000*l.* a year.

To accomplish the improvements which are evidently necessary, an Act or Acts of Parliament will be required, as well as a careful revision of the Acts of Sederunt of the Court of Session, under which the forms of procedure are regulated, through the want of both of which it would appear that the delay expense and dissatisfaction now attendant on litigation, so universally complained of, has in some measure been brought upon the people.

Bearing in mind all the foregoing facts and circumstances, it appears to Your Committee that the Court of Session should remain for a short time as at present constituted, but ought to receive with due despatch every facility which can be devised for simplifying and improving the practice, and thereby give confidence in the administration of justice, and bring back to the Supreme Law Court of Scotland that full share of business which ought to flow into the highest tribunal of every country; to accomplish which, Your Committee earnestly recommend that no means should be left untried, nor any measures unresorted to by Parliament and by the Court, which are likely to effect so desirable a consummation.

Under all the circumstances of the case, Your Committee is of opinion, that the Government is warranted in filling up the present vacancy on the Bench.

Your Committee beg to observe, that after all the facts and circumstances which have been brought out, there probably never was a time, in the whole history of the Court of Session, when the filling up of a vacant chair could be more identified than now with the interests of the people of Scotland, in the wise selection for which they are so deeply concerned.

It is the decided opinion of Your Committee, that it is desirable in every respect for the Ministers of the Crown to keep these facts and circumstances steadily in view, and to bear in mind that the person now to be appointed should be possessed, not only of the highest legal acquirements, but that he should combine with these, wisdom and sound discrimination to an eminent degree, so that old habits and prejudices may be fearlessly set at nought, and long-neglected duties be performed henceforth with energy and precision, and so evince an earnest desire to set a good example, by the complete and efficient discharge of the high and important duties entrusted to him.

Your Committee, in conclusion, would therefore earnestly recommend that every care be taken to secure such a choice, the more so, as it will unequivocally exhibit to the people of Scotland, the great anxiety and desire Her Majesty's Ministers have to remove and dispel, as far as may be in their power, the distrust and dissatisfaction, which unhappily has been too clearly shown to exist, with the present mode of administering justice in the highest tribunal in Scotland.

ATTENDANCE

## ATTENDANCE of the COMMITTEE on Days on which no Witnesses were examined.

*Mercurii, 11<sup>o</sup> die Martii, 1840.*

Sir Charles Grey.	Dr. Lushington.
Mr. Wallace.	Sir William Rae.
The Lord Advocate.	Mr. Fox Maule.
Mr. Pigot.	Sir Robert Inglis.
Mr. Horsman.	Dr. Stock.
Lord Teignmouth.	Mr. Ewart.

*Lunæ, 13<sup>o</sup> die Aprilis, 1840.*

Mr. Fox Maule.	Dr. Stock.
Mr. Wallace.	The Lord Advocate.
Dr. Lushington.	

*Mercurii, 15<sup>o</sup> die Aprilis, 1840.*

The Lord Advocate.	Mr. Wallace.
Dr. Stock.	Mr. Serjeant Jackson.
Sir Charles Grey.	Mr. Ewart.
Lord Teignmouth.	Sir Robert Inglis.
Dr. Lushington.	

*Mercurii, 29<sup>o</sup> die Aprilis, 1840.*

Mr. Fox Maule.	Dr. Stock.
Dr. Lushington.	The Lord Advocate.
Sir Robert Inglis.	

*Veneris, 8<sup>o</sup> die Maii, 1840.*

Mr. Fox Maule.	Sir William Rae.
Mr. Ewart.	The Lord Advocate.
Lord Teignmouth.	Mr. Serjeant Jackson.
Mr. Wallace.	

*Lunæ, 11<sup>o</sup> die Maii, 1840.*

Mr. Fox Maule.	Mr. Wallace.
Lord Teignmouth.	Dr. Lushington.
Sir William Rae.	The Lord Advocate.
Mr. Serjeant Jackson.	Mr. Ewart.
Dr. Stock.	Mr. Horsman.
Sir Charles Grey.	

*Mercurii, 13<sup>o</sup> die Maii, 1840.*

The Lord Advocate.	Mr. Wallace.
Dr. Lushington.	Dr. Stock.
Sir Charles Grey.	Mr. Ewart.
Mr. Serjeant Jackson.	

*Lunæ, 18<sup>o</sup> die Maii, 1840.*

Mr. Fox Maule.	Dr. Lushington.
Mr. Wallace.	Sir Charles Grey.
Mr. Serjeant Jackson.	The Lord Advocate.
Mr. Ewart.	

# LIST OF WITNESSES.

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*Thomas Thomson*, Esq. - - 26

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Mr. *William Alexander* - - 42

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Mr. *William Waddell* - - 57

Mr. *James Johnston Darling* - - 74

Lunæ, 30° die Martii.

Mr. *James Johnston Darling* - - 77

Mercurii, 1. die Aprilis.

*John Hope*, Esq. - - 93

Veneris, 3° die Aprilis.

*Duncan McNeill*, Esq. - - 118

*John Hope*, Esq. - - 135

Mr. *John Riddle Stodart* - - 139

Lunæ, 6° die Aprilis.

Mr. *John Riddle Stodart* - - 151

Mr. *James Johnston Darling* - - 158

Mr. *John Hunter*, Junior - - 159

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Mr. *William Miller* - - 175

*Robert Bell*, Esq. - - 195

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*Robert Bell*, Esq. - - 202

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*George Joseph Bell*, Esq. - - 207

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# MINUTES OF EVIDENCE.

*Mercurii, 18<sup>o</sup> die Martii, 1840.*

## MEMBERS PRESENT :

Mr. Pigot.  
Mr. Wallace.  
The Lord Advocate.  
Sir Charles Grey.  
Sir Thomas Dyke Acland.  
Mr. Horsman.

Dr. Stock.  
Mr. Ewart.  
Sir Robert Harry Inglis.  
Lord Teignmouth.  
Sir William Rae.

THE HON. FOX MAULE IN THE CHAIR.

The Right Hon. the Lord Advocate of Scotland, a Member of the Committee, Examined.

1. *Chairman.*] YOUR Lordship is Lord Advocate of Scotland?—I am.
2. How long has your Lordship been in practice at the bar of Scotland?—I passed in 1812, and have been in practice ever since.
3. How long have you held the office of Lord Advocate?—About a year.
4. During the period you have practised at the bar, particularly of late years, your station has been among the first rank of advocates at the bar?—I believe I may say yes.
5. You have been engaged in most of the principal and important causes that have been heard before the Court of Session in Scotland?—Latterly I have.
6. Will you, from your experience of the bar of Scotland, give information to the Committee of the nature, the extent of jurisdiction, and the duties of the Court of Session in Scotland?—That is a very large question; but I suppose the Committee wish it to be answered generally. The jurisdiction of the Court of Session extends to all civil cases of every description whatever, including all Consistorial and Admiralty cases. In the more important civil cases, particularly those touching real property and consistorial and admiralty cases, it has exclusive jurisdiction; in all other cases, with exceptions not worth noticing, such as small debts cases, it exercises a jurisdiction of review as well as an original jurisdiction: So that all civil cases, either in virtue of the original jurisdiction or the jurisdiction of review, come under the cognizance of the Court of Session; and of course the duties of the judges of the Court of Session extend to the preparation of those cases, and to their decision, including the discussion before judgment is pronounced. No case can be brought before the Court of Session originally, where the value, if there is a conclusion for money, is under 25*l.*; such cases must go before the sheriff; but the judgment of the sheriff may be reviewed by the Court of Session.
7. You have stated the nature and extent of the duties of the Court of Session, and the jurisdiction of the Court of Session; will you state, for the information of the Committee, the constitution of the Court of Session and the general arrangement of the court?—In answering that question I shall go back a little way, but shall detain the Committee a very short time in doing so. Before the year 1808,

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when the Court of Session ultimately decided a case, the whole 15 judges might have sat together, and the quorum of the court was nine. Cases were prepared and decided in the first instance, at least the greater number of cases, before the Lord Justice Clerk or one of the puisne judges, who sat in the outer house, in certain rotation, and from the decision of those individual judges so sitting in the outer house, there was an appeal by review to the inner house, who decided them, sitting together to the number of 15, or with a quorum of nine. Then the business of the Court of Session, which is done in what is called the Bill Chamber (of which I shall speak afterwards), was done by the puisne judges, also in rotation. By an Act of Parliament which was passed in 1808, the 48th of George the Third, chapter 151, the Court of Session was divided into two divisions; the President and seven puisne judges making one division, and the Justice Clerk and six puisne judges making the other; and the 13 puisne judges officiated in the outer house as judges ordinary; they tried cases in the first instance, and from their decision, according as they were appealed from to one division or the other, there lay an appeal to the decision to which the appeal was made, and the judges of that division decided it, four being a quorum. In 1810, by the statute of the 50th of George the Third, chapter 112, the divisions of the Court of Session were reduced to five judges each, the President and four judges making one division, and the Justice Clerk and four other judges making the second division; the three junior judges of the first division and the two junior judges of the second division acting in rotation as permanent ordinaries for the respective divisions; and the quorum of the judges in the inner houses was by that statute reduced from four to three. The number of judges still remained the same, five in each division and five officiating in the outer house, and they might call in a lord ordinary to decide in the event of an equality. Then by the 6th of George the Fourth, chapter 120, the judges of the two inner houses were reduced to four, the Lord President and the three senior puisne judges forming the first division, the Justice Clerk and the three next senior puisne judges forming the second division, and the seven junior judges were made permanent lords ordinary, three being fixed to one division and three to the other division, and one remaining as ordinary on bills.

8. Sir *W. Rae*.] Was that arrangement suggested by any commission?—It was.

9. Was that commission a Parliamentary commission?—It was.

10. Have you any recollection of the individuals who composed that commission?—I cannot now repeat the names of all the commissioners; they will be found in the report, which is on the table of the Committee. By a subsequent statute, the 11th of George the Fourth, and the 1st of William the Fourth, chapter 69, two of the lords ordinary were struck off; that is to say, it was determined by that statute, that upon their death or resignation, the appointment should not be renewed; that reduced the number of the judges to 13, leaving the President and three in the first division, the Justice Clerk and three in the second division, and five in the outer house; four as permanent lord ordinaries; two attached to each division, and one as the ordinary of the bills. That is the present constitution of the Court of Session, with this exception, that by the 2d and 3d of Victoria, chapter 36, the lords ordinary are no longer attached to a particular division, but all the lords ordinary belong indiscriminately to the two divisions. The Court of Session, therefore, now consists of two divisions, called the "inner houses," each having four judges, and of five lords ordinary sitting in what is called the "outer house;" the lords ordinary sit separately, and the two divisions sit in separate chambers; the two divisions are of co-ordinate jurisdiction in all respects, and there is no appeal from one division to the other; whenever a division decides a case, it decides it finally in the Court of Session; in cases of a difference of opinion, or in cases of great difficulty, either division is entitled to call in the opinion of the consulted judges, and in those cases the division calling in the opinion of the consulted judges must decide according to the majority of the consulted judges; but with that exception, both divisions are of co-ordinate jurisdiction; and either division deciding a case decides it finally in the Court of Session, there being no appeal from one to the other; causes coming into the Court of Session, for the most part, are prepared before the lords ordinary, and they are not only prepared before the lords ordinary according to the form of pleading provided by the statute of the 6th of George the Fourth, chapter 120, but they are decided by them in the first instance, and then, the Lord Ordinary having decided the case, there lies an appeal from

from him to either division of the court; if that appeal is not taken within a certain time, the case as decided by the Lord Ordinary becomes final, and his decree is held to be a decree of the Court of Session, and is not even subject to an appeal to the House of Lords, because no case can be appealed to the House of Lords that has not been appealed to one of the divisions, and decided by that division.

11. Sir *R. H. Inglis*.] Can your Lordship state what proportion of appeals to the House of Lords may have been stopped by the process to which you have now called the attention of the Committee?—One very important class of appeals was entirely stopped by the different arrangements contemplated in those statutes, partly by the introduction of the jury court, and partly by another legislative enactment, viz., that there should be no appeal in certain cases, where there were proofs taken upon commission, and where the Court of Session were required to make findings in fact, exhausting the facts of the case, just as in England in the case of a special verdict; from those findings there was no appeal to the House of Lords, but the Court of Session and the House of Lords dealt with those findings as conclusive in fact, so that the only matter that remained to be determined was the law of the case. I cannot state the effect that this has had in the diminution of the number of appeals; it must have been very considerable, because it struck at a class of cases which used to be the subject of appeal.

12. Dr. *Stock*.] How long since has that arrangement been introduced?—The Jury Court was introduced in 1815, and that decided a great number of cases; I think the latter part of the arrangement was introduced by the statute of 1825.

13. *Chairman*.] You have stated that the causes are all prepared before the lords ordinary?—Yes, and decided by them; and from their decision there lies an appeal.

14. Will you state the mode in which the causes are heard before the Lord Ordinary?—There was a very great change introduced into the proceedings in the Court of Session by that statute of the 6th of George the Fourth, chapter 120. The great object of that statute was to accomplish a change, which I think it is of the utmost consequence to have thoroughly introduced, and carried much further than it has yet been carried, that of substituting parole pleadings for the printed and written pleadings which previously existed, because before that statute all cases got into writing or printing. In some stages they might have been decided upon debate; but even after they were decided upon debate, it was in the power of either party to give in a written argument, and then the decision pronounced upon that written argument was taken to the inner house upon another written argument. In cases of great importance the court was in the habit of ordering what was called a hearing in presence; that is, a solemn *viva voce* discussion; but except in those cases, and with the exception of those observations which either of the senior counsel in the case might have thought it necessary to make, in addition to the written or printed arguments which were under the consideration of the inner house, the whole of the cases prior to 1825 were decided upon written or printed pleadings.

15. Dr. *Stock*.] Where the parties wished to bring the relevancy of any pleading before the judge, was that done by formal exception, as in our courts of equity?—It was done by a paper that was called a representation in the outer house.

16. A condescendence was not used?—A condescendence might be ordered for the purpose of stating matter of fact.

17. If the party thought his interests aggrieved by an improper, or informal, or insufficient statement of the facts, what was the form that he adopted?—The case came into court upon a summons; the defence was put in; and the defences were at that time very meagre indeed, more meagre than they are now; then it came before the Lord Ordinary, and the Lord Ordinary might pronounce a judgment dismissing the action, or a judgment in the terms of the summons upon hearing counsel, without ordering any further papers at all; or he might order one or other of the parties to condescend. If he had done so, that order, and generally any judgment he might have pronounced, whether in the form of procedure or on the merits, would have been subject to be brought under his review by a representation; and that representation might have been a long-written argument. If he had decided upon that representation, the party against whom he decided was entitled to give in another representation; and either party was entitled to go on representing (and sometimes we had cross-representations) till there were

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two consecutive judgments agreeing; when there were two consecutive judgments, the case was final before the Lord Ordinary.

18-19. Were those points heard upon parole arguments before the judge?—Never, unless he ordered it. He might order it with a view to explanation or further argument; but it was scarcely ever done. The case was always decided upon written pleadings, which the judge perused at home. This was the old system, which was held to be a great grievance, and which was altered by the statute. When the Lord Ordinary had pronounced two consecutive judgments, the party who thought himself aggrieved presented a petition to the inner house; and when that was moved at the bar, it might have been opposed as a petition not worthy to be answered; but in general, of course, it was ordered to be answered, and the answers were put in. Then the judges perused the petition and answer at home, and the case was put out for decision, and it was open for either party to make an additional statement; but that additional statement was never made with great effect, because it was made to judges who had already perused the written argument, who came to court with their minds very much made up, and in a state in which few counsel would think it useful to say a great deal in attempting to remove the impression. After that decision was pronounced, the party was entitled to give in a second petition; and in the same manner in the inner house, the parties might have petitioned till the judges had pronounced two consecutive judgments, and then the case was at an end in the Court of Session, and there was no remedy but an appeal. But prior to the introduction of jury trial the appeal was both in fact and in law. This state of things was held to be a very great abuse; it made proceedings almost interminable; it made litigation very vexatious and expensive; it was otherwise not satisfactory in many respects. The object of the statute of the 6th George the Fourth, chapter 120, was to do away, in a great measure, with this system of printed argument, and to substitute for it parole argument. That statute of 1825 introduced among other improvements this, that there should be only one judgment of the Lord Ordinary upon the cause or any point of it, and only one judgment of the inner house; that you should not require two consecutive judgments, and there should be no power of bringing the Lord Ordinary's judgment in review before himself, or any judgment of the inner house in review before the inner house. It produced also this arrangement, that it attempted to obtain by the machinery which that statute made, more regular pleading, in which the parties should state distinctly and separately, from the argument, the facts on which they respectively relied, and also the pleas of law, as they are termed, applicable to those facts, by which they meant to support the action or the defence; so that the ordinary course taken was this, that the summons, which is the usual writ, was met by defences; if the parties were satisfied that the summons and defences contained a sufficient statement of their facts respectively, and also of the law upon which they relied, then what is called "the record" was closed upon the summons and defences, and after the record was so closed, the case was argued and decided by the Lord Ordinary and the inner-house; if that summons or and defence were not held to be sufficiently explicit, or sufficiently distinct and enlarged in the statement of the fact, then the one party or the other was required to give in a condescendence; that condescendence was answered; there was a revision of the condescendence till the parties were satisfied that the several statements of fact were properly made, and then the record was closed, and the case was decided, first, by the Lord Ordinary, and then by the inner-house. The purpose of the statute of 1825 was, that the decree should be pronounced upon parole argument, proceeding upon the basis of those papers so adjusted; but it reserved power to the Lord Ordinary and the court, if they chose, to order what was termed "minutes of debate or cases," namely a full written argument upon the case, before they pronounced their judgment. Suppose, for instance, a case is heard before the Lord Ordinary, and the Lord Ordinary is of opinion that it is an important case in point of law, that it involves principles of great importance, and he wishes to have it more deliberately considered, and to see it stated in writing, he may do so before he decides; and then the cases which are laid before him must, in the event of an appeal, be laid before the inner-house; in the same way the inner-house may, after parole argument, say "We should like to see a full written argument upon the case," and it is in their power to order a written argument; in short, it was felt that we were in a state of transition, that, as regarded those judges who had been used to give their  
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opinion upon written arguments, that you were making a great change by substituting parole arguments, and that minds that had been trained to judicial decision upon one course of things might not be able to decide upon the other course of things, and therefore there was a power reserved to the judges, by the statute, of doing that which had been done by the former practice of the Court of Session—which I believe does not exist in the courts of England, where they decide no cases on written argument.

20. Sir *W. Rae.*]—Express permission is given by the statute to the court to order a written argument?—Yes.

21. Dr. *Stock.*]—What is the form of the summons?—If a summons is very well drawn, it is a very logical and syllogistical writ; it sets forth who the party is who pursues; it sets forth the ground of action, in fact draws, with reference to that, the conclusions in law, and it makes the demand of the party.

22. In cases of an ordinary nature is there a prescribed form?—Not actually a prescribed form of words. There are known and received styles. There are certain styles for peculiar forms of action.

23. The summons does not run into any detail of the facts?—It may run into a very great detail of facts, and sometimes it is a great advantage, because it saves condescending; and all the parties who are anxious for the improvement of the system introduced by the statute of the 6th of George the Fourth are anxious to have the summons and defences so full that parties may close the record without further discussion.

24. It is in the discretion of the plaintiff who brings the action, and his counsel, to what extent the summons shall contain a specification of the facts of the case?—Very much discretionary; only he will run the risk of having his action cast out unless he gives a relevant statement of the facts to bear out his conclusions; but a party may make a relevant statement with a very meagre statement of facts.

25. Mr. *Wallace.*] Is there not a great discrepancy between the mode of preparing summonses?—Yes, there is a great difference.

26. Is not that one of the alleged causes of so much uncertainty, as well as delay in decisions?—No, I am not aware of that; there is no doubt a great difference; you have good and bad; again, you have parties that keep back their case and parties that bring it out at first; but a bad summons leads necessarily to a condescendence and to some extent of pleading; I think that but for the jealousy that was entertained of the Court of Session making Acts of Parliament for their own proceedings, we should have derived a great deal more benefit from that statute of the 6th of George the Fourth, chapter 120, than we have. Because their hands were tied down so strictly to the particular form of proceeding laid down by that statute, they have been prevented from making rules and regulations, the benefit of which would have been felt by the whole profession, but which rules could not be brought into operation without a statute. As regards rules and regulations declaring principles of law, to which the court intended to give application in cases that came before them, I think that is a dangerous principle, and has not been in use for a long time; but with respect to acts of sederunt regulating the course of proceeding, such as the rules of practice in the courts in England, I think it is a pity that that particular statute has bound the court down so tightly that they have been unable to improve their proceedings in a great many respects.

27. Sir *W. Rae.*] You mentioned the old practice of acts of sederunt, containing matters and principles of law; has that practice ceased?—It has.

28. Within what period has it ceased?—A great many years back there was a strong feeling about it; indeed it never did prevail to the extent that it was said to prevail.

29. Has it existed to any extent since you came to the bar?—I think not.

30. Dr. *Stock.*] Is a summons authenticated by any form of the court; does it go out under seal?—Yes, it is a writ that issues under a particular seal, under what they call the signet; and all those papers that I have referred to, the summons, the condescendence, the revised condescendence, and the answers, are all authenticated by the clerks of the court. They are regular steps of the proceedings, which are kept by the officers of court, and sent up to the House of Lords in the case of an appeal; the only writ that is served upon any party is the summons; that is the original writ that brings the parties into court, and there is no occasion for any further service.

31. *Chairman.*] You have stated that, in 1825, under the 6th of George the Fourth, chapter 120, a great change was made in the mode of transacting business before



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before the Court of Session, by the substitution of parole pleading for written or printed papers; has the spirit and intention of that Act been fully carried out in the mode in which causes are heard and decided in the first instance before the lords ordinary?—My own impression is, that that Act has not been carried out so far as I think it was intended, and so far as I myself personally should wish to see it carried; I do not blame the judges, or any body for that; I think that “cases”—but not certainly without the concurrence of a considerable part of the profession—have been ordered more frequently than might have been, although every year the practice increases, upon the whole, as well the wish of the judges and the wish of the profession, as to decide the case upon parole pleading; I think the spirit and intention of the Act has been carried out; but too many printed papers have been perhaps ordered; with respect to the parole discussions before the lords ordinary, I should say that almost from the commencement they have been extremely satisfactory to the profession; the discussions have been very full.

32. Can you speak also to the satisfaction which such parole discussion has given the public?—Yes, I think it has given the public satisfaction. The great objection to the system has not arisen from the discussion or argument of counsel not being sufficient before the lords ordinary, but from the delay and expenses in preparing the causes in the terms of that statute. Addressing myself to this point, namely, after the record has been completed, containing all the parties’ statements in fact and their pleas in law, I should say that nothing whatever can have been more satisfactory to the parties themselves, to the profession, or to the public, than the discussions that have taken place in the outer house; the hearings have been very patient, they have been very long (two counsel of a side have been heard), and very exhausting, both with respect to authority and every other point.

33. Has the same fulness of discussion taken place in the inner house which you describe as having taken place in the outer house?—No, I think not.

34. As a professional man, to what cause would you ascribe that difference?—I ascribe it in a great measure to the habits which the judges had acquired under the former system, and to the difficulty, perhaps, that any body might feel in reading a case which is considered as containing all the statements in point of fact, and the pleas in law, especially where it is accompanied with written argument, without making up one’s mind very much upon the subject, or at least acquiring a strong impression, which may render a person impatient of a parole argument addressed to him, and may also discourage that argument being urged, which would with more propriety be addressed to a person less informed of the case. There is no doubt, that under the old system, when the case was fully before the court upon those long written pleadings, every body that remembers the thing must know that the judges came to the court with their minds very much indeed made up, and their judgments very often written out, and that any thing that was said at the bar was an attempt to overcome a strongly-conceived impression, to correct some very evident mis-statement, to make a pause in the judgment, to insure deliberation in the case, but it was never a discussion such as we have now in the House of Lords, where we address a judge whose mind has no impression upon the case. Still we have a great many written arguments under the present system, perhaps too many, and yet those written arguments are held not to preclude, so much as they used to do, *vivâ voce* argument at the bar; parties expect more *vivâ voce* argument now at the bar; but finding that the judges come to the court with a very strong impression upon their minds, from reading those papers and arguments, it is always less satisfactory. With respect to those cases which stand upon the bare statement of fact and pleas in law, without any written argument, from the habit of the judges of studying written argument at home, and making up their minds upon such written argument, they will take the impression, and they consequently come into court under an impression, perhaps not so strong as the profession and as parties suppose, but still unquestionably strong; and this leads further, to a difficulty in obtaining that full hearing in the inner house which is obtained before the Lord Ordinary. I do not think myself that counsel would be prepared, or even wish to argue a case before the inner house to such a length as they would do before the Lord Ordinary, because a full argument of the case for several hours must show the counsel on both sides where the real force of the case lies, and that is one use of the full and exhausting argument before the Lord Ordinary; that it leads the minds of the counsel on both sides to view the case in its proper bearings; and wherever it was afterwards argued, whether in the inner house or in the House of Lords,

Lords, it would never be argued to the same extent. But it does leave a great deal of matter to argue, and often a great deal of matter to explain, and the judges from previous knowledge of the general facts of the case are apt to show an impatience or indisposition to hear those explanatory statements which, if listened to, might enable the counsel to address themselves to that part of the case in which their arguments would be most effective. I think, therefore, I am obliged to say, that with respect to both the inner houses (not at all meaning to say that there is not the greatest anxiety on the part of the judges to inform themselves fully upon the case, and give a right decision upon the points of law and fact), still they come into court with an indisposition to hear the argument so fully as is to be wished; I think that indisposition very much arises from their having perused the written papers.

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35. *Sir W. Rae.*] The cases in the inner house are first decided by the Lord Ordinary in the outer house; is his judgment accompanied or not with an explanation of the grounds of decision?—I am very glad that that question has been asked me; in general the judgment of the Lord Ordinary is accompanied with a note in which he explains the grounds of the judgment; that note in many cases is a very full note. There has been a great deal of discussion at the bar whether that note is a very desirable thing to have or not, because, when full, it conveys an impression, and therefore an authoritative argument, upon the case; and that circumstance is one of those which have produced perhaps in part this indisposition in the inner house to enter into that full hearing which would be desirable; because they are apt to take too much of the case from the note, both with respect to the facts and the arguments. Accordingly there are two opinions about it; some persons wish for no note, and other persons wish for a full note. For my own part, I think if there is a note of the Lord Ordinary it should be a full note.

36. *Chairman.*] Is it in the discretion of the counsel for the parties to guide the Lord Ordinary in the decision whether there should be a note given or not?—Not the least; it is in the discretion of the Lord Ordinary to give a full note or no note at all.

37. What is the practice of the Lord Ordinary?—To give a note, and generally a full note.

38. *Sir W. Rae.*] Is that note seen by the parties before the hearing in the inner house?—It is seen; it is printed, and goes with the record before the inner house; and in general the note of the Lord Ordinary is a very great assistance to the party in whose favour the judgment is pronounced, and of course it makes it up-hill work for the party bringing the judgment under review. I do not object to that; I think it right that the party bringing the judgment under review should be able to contend with the grounds which the Lord Ordinary states. But with respect to that habit of forming a strong impression or opinion from perusing the printed record, even when there is no argument, the Lord Ordinary's note is an additional circumstance which creates it, because the judges think that they have in that note a very accurate statement, and a very impartial statement, of the grounds upon which the parties rest in argument, and therefore they expect to hear less from the bar.

39. *Mr. Wallace.*] Has any lord ordinary been in the practice of declining to give notes?—No.

40. *Mr. Horsman.*] Are the notes exhibited to the parties before they are finally given out?—The notes are given out with the judgment, signed with the initials of the Lord Ordinary, and are explanatory of the grounds of the judgment; they go before the judges of the inner house, and are printed along with the records, for their consideration; what the judges of the inner house see at home are the records and the written argument, if there is written argument, and the notes of the Lord Ordinary, if there are notes, explaining the ground upon which the judgment rests.

41. *Dr. Stock.*] Then the Lord Ordinary does not assign his reasons orally in giving judgment?—Seldom. This point, which I have mentioned, has been felt so very strongly, that in the evidence that was given before the Law Commission in Scotland, various plans were proposed for the purpose of checking it, and I think it right to myself, as there may be supposed to be some impeachment upon the inner house, to mention how it struck other members of the profession. Now, you will find in the evidence of Mr. Hope, the Dean of Faculty, and other evidence taken

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before the Law Commission, that persons had their attention drawn very strongly to this point, for the purpose of checking this rapidity of decision of the court, as to the effect of the judges reading and studying the papers at home, and coming into court with so strong an impression of the case. One proposal was, that they should never see the record till they came actually into court, and till the party should begin to speak. I do not say that is a good plan; I was against it, and the Commission were likewise against it, but I mention that as showing the impression that prevailed in the profession upon the subject then. Another thing proposed to prevent rapidity of decision was, that the judges should never decide a case upon the day on which it was argued. That was also rejected; it was thought not right to the judges; it was thought that in any plain simple cases it would put off business, and prevent the despatch which would be desirable. That I mention again as another circumstance which shows the feeling of the profession; and in the Report we were obliged to state that pretty strongly, as the Committee will see at page 30. We have given an abstract of some of the evidence applicable to the same matter in pages 40 and 41.

42. *Chairman*.] Since 1825 have the written and printed arguments been used to a greater or less extent before the departments of the outer house or of the inner house; in which of those departments have the written and printed arguments prevailed to the greatest extent up to the present hour?—I do not exactly know how to answer that. Printed cases are often ordered in the inner house where they are not ordered in the outer house; and cases are ordered in the outer house sometimes because the parties fear that if they go to the inner house without those cases, the cases will not be heard fully there. I have known cases moved for upon that ground.

43. Can you state whether more written and printed argument is used in the inner house than in the outer house?—Yes, cases have been ordered in the inner house, where none have been ordered in the outer house; all that are ordered in the outer house come to the inner; and in the inner house many additional written arguments are ordered.

44. *Sir W. Rae*.] Do they order those cases after hearing counsel, or before it?—There is generally hearing of counsel; sometimes they are ordered after very full hearing of counsel, and in consequence of very full hearing of counsel. It will not be understood that all my remarks extend to every case; on the contrary, I should say, every counsel of eminence at the bar, and entitled to weight, can, by his statement that the case is one of extreme importance and difficulty, command a full hearing.

45. *Chairman*.] You stated that the change produced by the 6th of George the Fourth, chapter 120, has given satisfaction with reference to the practice before the lords ordinary; has it given the same satisfaction to the parties with regard to the practice before the inner house?—No, I think the public feel with the profession about it; and I think the parties feel with the profession, that it has not been so well there.

46. Have you ever known parties in the outer house ask the Lord Ordinary to make an order for cases, that they might ensure their being heard in the inner house?—Yes, I have. That the parties might be sure that the case which was fully heard before the Lord Ordinary should also be fully considered in the inner house.

47. Will you state what you suppose to be the grounds upon which such parties make the application?—It may be a prejudice, or prepossession, or an apprehension, that the hearing would not be so full in the inner house as in the outer house; and that unless their case was very fully stated, they might run the risk of miscarriage, to which they would not otherwise be subject; and that the only way of insuring that full hearing in the inner house was by drawing up a written case.

48. *Sir W. Rae*.] Does this apply to causes in which cases have not been ordered by the outer house?—As I understood the question, it was this, whether I had ever known of parties applying to the Lord Ordinary to order "cases" to ensure fuller attention in the inner house; that implied that the Lord Ordinary had not ordered cases, but was ready to decide without having cases. I have known that occur; and sometimes I have known both counsel apply to the Lord Ordinary that cases might be ordered.

49. That impatience must have been exhibited in the inner house in a cause where there was no written case?—Yes; I think there are many cases in which the inner house would not allow, at least it is supposed they would not allow, such a full

full and elaborate argument as is obtained before the Lord Ordinary. Where a case has occupied in argument one or two days, there has been an apprehension entertained by parties, that if it was argued before the inner house, they being equally ignorant of the matter with the Lord Ordinary, they would not have so full a hearing, and therefore they ask the Lord Ordinary to order "cases."

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50. Sir *C. Grey*.] There would always be the note of the Lord Ordinary?—Yes.

51. Then parties might apprehend that the judges of the inner house might be guided in their judgments by the note of the Lord Ordinary?—I have stated that already.

52. Sir *W. Rae*.] Is it your opinion that the case would be better decided, looking simply to the decision from the bench, having nothing but the parole statement of the counsel, than if the case is fully stated by them in a case in writing, the judges having also the assistance of the Lord Ordinary's notes, and all the inquiries that they can make?—I think at present, with respect to many of the judges, there is a great advantage in having written arguments.

53. *Chairman*.] With respect to the judgments of lords ordinary, and the judgments in the inner house, which of the two classes of the judges in the Court of Session are in the habit of giving the fullest judgments upon the cases brought before them?—The lords ordinary certainly, because their notes are generally very full, very satisfactorily explaining the grounds upon which they proceed, whether those grounds are, in the opinion of the parties, right or wrong. With respect to the inner house, I think there are many cases in which their grounds of judgment are fully given, particularly where they have had the opinions of the consulted judges, in cases of very great importance; but there are many cases in which there is a want felt of a full and anxious and deliberate statement of the grounds of decision; and that circumstance accompanied with not a very full hearing, where the cause has been before the court upon the record merely, and upon the note of the Lord Ordinary, is not satisfactory in many instances to the profession or the parties themselves. There are many cases, as the Dean of Faculty has observed, in the passage I have pointed out, in which the counsel on both sides have felt the judgment to be quite right, but in which it has been so rapidly carried through that it is difficult to find satisfactory grounds for the decision in any thing that was said by the court, and that, I think, a great misfortune. I think it essential for the right discharge of that part of the judicial duty, that the grounds upon which the judgment is meant to rest should be fully understood, that the party should at all events be satisfied that what he had to offer, either for his demand or in his defence, has been fully considered, although the result may have been against him.

54. Sir *W. Rae*.] Do those cases occur often?—I do not say often; but I think that has been felt by every body who has practised in the House of Lords.

55. Mr. *Horsman*.] Has that defect which you mention not been commented upon by the judges in the House of Lords?—Very frequently, in many cases; what I have observed now may not at all touch the correctness of the judgment; it may not be inconsistent with the fact, that judgment has been pronounced after the fullest consideration and study of the case; what I have observed as to the thing giving dissatisfaction to the public, is the want of a full and explicit statement, at the time of the decision, of the ground of the decision.

56. *Chairman*.] What is your opinion as to the increase or diminution of the general business of the Court of Session, of late years?—I believe it would rather appear from some returns, and perhaps otherwise, that there has been a diminution of the business, of late years, in the Court of Session; but I cannot trace that to any permanently operating causes. I may mention, with respect to all those returns, that as to the increase or diminution of the business, there may be a very great fallacy about them, because every cause, however insignificant, makes an unit in the number of cases. Cases may be of the very greatest possible extent and importance, which would only figure as one along with a case which does not remain in court for five minutes, because it is a matter of form. Then, with regard to cases of very great magnitude and importance, some of those result either from the obstinacy of parties, or the difficulty of investigation in a long and intricate proceeding requiring a number of judgments on a number of detached points, so that one cause will occupy the court a very long time indeed, while a cause more simple may be much more quickly disposed of.

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57. Sir *W. Rae.*] Are there not a certain class of cases that must come at once before the inner house without going before the Lord Ordinary?—There are certain classes of cases which come in the first instance before the inner house, but those are now not nearly so extensive as they were formerly; and I do not think it of so much importance to go into this matter, for this reason: that the preparation of those cases is generally carried on before the lords ordinary, the lords ordinary not deciding them when they have prepared them, but sending them to the inner house. But it is of great importance in reading the returns to recollect that there are cases that come before the inner house, and which are prepared by the Lord Ordinary. In those returns you have the cases which come before the Lord Ordinary, which will not show the number of cases brought into the Court of Session, because there are a considerable number of applications which sometimes lead to litigation that do not appear as cases instituted before the Lord Ordinary, but as cases in the inner house. Those cases go to the Lord Ordinary, just as in England, on a reference to the master.

58. *Chairman.*] You have stated that civil cases may come under the review of the Court of Session; will you state what the duties are which devolve upon the Court of Session in addition to the civil duties which they have to perform in Scotland?—All that I have said hitherto applies to the Court of Session as a civil tribunal; but I have not mentioned the Bill Chamber—which is a department of the court of great importance, and involving a great extent of business—the Bill Chamber being always open, without vacation, for purposes of injunction or interdict, or stay of diligence process, or the proceedings in cases of bankruptcy. As to the other duties performed by the judges of the Court of Session, the Supreme Criminal Court in Scotland, though constituted by a separate commission from the Court of Session, consists entirely of judges of the Court of Session. The Lord President, since 1825, who is now Justice General, and the Lord Justice Clerk, and six junior judges of the Court of Session, constitute the Court of Justiciary, and that Court of Justiciary sits constantly in Edinburgh; I do not mean every day, but whenever occasion requires, three judges presiding for the despatch of criminal business; and there are seven circuits appointed in Scotland, three in the spring, three in the autumn, and one in the winter in Glasgow, in each of which circuits two justiciary judges officiate.

59. With the exception of the Lord President, all the judges of the Court of Justiciary now perform those circuit duties?—Yes; the Lord Justice Clerk and five of the judges of the Court of Session. Besides that, by a recent statute, the business of the Exchequer in Scotland is thrown into the Court of Session, and is discharged by two of the puisne judges of the Court of Session.

60. Dr. *Stock.*] What is the nature of that business?—It is fiscal business almost entirely; it is revenue business; there are occasional trials; there are arguments of considerable length sometimes. There is not a great deal of duty, but such certainly should not be overlooked.

61. Mr. *Pigot.*] There may arise considerable argument in certain cases for penalties in condemnations *in rem*?—Yes; there may be appeals from justices of peace, and trials before juries, and appeals from surveyors of taxes; all that business is done.

62. Is either of the judges having the Exchequer jurisdiction a justiciary judge?—No, by the late arrangements he is not. Besides that, since the Jury Court has been merged in the Court of Session, there are the jury trials, which are done in Edinburgh by the heads of the court, unless they are unable to attend; and in circuit, either by the judges of justiciary who are in circuit, or otherwise by judges of the Court of Session sent specially for the purpose.

63. Sir *T. D. Acland.*] What is the difference of jury trials from the cases already mentioned?—Perhaps the members of the Committee are not all aware that in Scotland all cases are not tried with the assistance of a jury as in the common law courts in England. The common course of trial in the courts of Scotland resembles much more the proceedings in the Court of Chancery in England and Ireland than in the Court of Queen's Bench and in the other courts of common law, where the juries are brought in to assist the judges. The introduction of juries is a recent introduction in Scotland; it was introduced in 1815; I do not know that it has proved very successful, but I do not despair of its ultimately proving successful.

64. But it constitutes a separate class of cases?—Yes, there are certain enumerated cases in the Acts of Parliament which must be tried before a jury. The Court

Court of Session may send an issue to be tried by a jury. All those cases, therefore, whether tried by a jury or not, are devolved upon the Court of Session in one form or another.

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65. In addition to all the business you have described?—Yes; and the judges of the Court of Session sit as commissioners of teinds, for the purpose of allocating the stipends to the clergy, and of determining a number of questions with respect to the payments to the clergy of teinds; and though that recently has not been so extensive a portion of the business, it is not nominal, but a real and important duty.

66. Mr. *Pigot*.] Do they sit in that capacity by a separate commission?—Yes; the commission is extended to all the judges of the Court of Session, but it is a separate commission and a separate court.

67. *Chairman*.] Then the whole of the civil cases that come before the Supreme Courts, the whole of the business of the Exchequer, and all the criminal jurisdiction of the Supreme Courts, is done by the present force of 13 judges in the Court of Session?—Yes; and the criminal business is every year very much increasing indeed. I know it has been stated that that has arisen from an increase of crime. I should think myself, from the increase of crime necessarily incident on increased population, but still more from the very much more improved system of police. The increase, however, is very great indeed, as appears by the return which I have here; and I think it right to mention that, in reference to the extent of business in the Court of Justiciary.

68. Mr. *Wallace*.] What is the date of that?—This is a return given to the House on the 15th of March, 1830; it is entitled, "Court of Session in Scotland, No. 9." I shall take one year. I find that in 1810, the number of cases tried in the Court of Justiciary was only 20, and in Circuit 139; but in 1829, the number tried in the Court of Justiciary was 101 instead of 20, and 326 instead of 139; and I find from the return in 1838, which is the last return of criminal business which has been laid before the House of Commons, the number of cases tried before the Court of Justiciary, instead of 20 was 309, and in Circuit was 560 instead of 139; that is a very great increase in the business. I do not know the number of days that are occupied by the Court in Edinburgh in consequence of this increase of business, but I find, in 1829, the Court in Edinburgh sat 31 days, and the Circuit Court sat 41; in all, 72 days to try 101 cases in the Court of Justiciary, and 326 in the Circuit; whereas last year, 1838, they had to try 309 instead of 101, and 560 instead of 326; and I should say myself, from my experience of the last three years, and I dare say, Sir William Rae will confirm me, that the cases that are tried now in the Court of Justiciary and in the Circuit are all more important than they used to be, because all the cases that can be sent to the sheriffs are tried before the sheriffs with a jury, and the more important cases only are reserved for the Court of Justiciary.

69. Mr. *Horsman*.] Can you give an opinion whether the number of days the Court of Justiciary sat was more than 71?—I cannot state the fact, but I believe there can be no doubt it has sat for many more days. The extent of the business and the responsibility of the business has very much increased.

70. Sir *W. Rae*.] Are you aware whether any effect has been produced upon the criminal business by the abolition of capital punishment by the prisoners pleading guilty?—I do not know, I dare say that may facilitate, prisoners pleading guilty; in capital cases they are more reluctant to do it; if I am asked generally, I should state that the number of pleas of guilty are not very numerous. The Court of Justiciary, as a supreme criminal court, has an appellate jurisdiction from all inferior criminal courts in certain cases; wherever an appeal can lie from a criminal proceeding, it is taken, not to the Court of Session, but the Court of Justiciary; the Court of Justiciary's sentence is final, without appeal to the House of Lords.

71. *Chairman*.] Will you state a case in which an appeal can be made to the Court of Justiciary?—Suppose the sheriff exceeds his power of sentence, or a sheriff sustains an irrelevant charge; there are a number of other cases which might be mentioned.

72. Mr. *Pigot*.] You have nothing in the Court of Justiciary in the nature of applications for new trials in the same manner as exists in the English law in cases of misdemeanors?—No; but there is an useful power in the judges at circuits when they meet with a difficult point, before trial, to certify the case to



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the Court in Edinburgh; that is, to adjourn further procedure to the Court there, when the assistance of all the justiciary judges may be had: or, where difficulty arises as to the mode of punishment, they may certify it to the High Court of Justiciary.

73. *Chairman.*] Considering all the duties which devolve upon the Court of Session, is it your opinion that one division could do the business of the court?—No, I think decidedly not.

74. Is it your opinion that the divisions, as they at present exist, could be reduced in the number of judges, and at the same time conduct the business as satisfactorily as at present?—The meaning of that question, I suppose, is, whether the division should consist of four judges, or might not conveniently consist of three. I have a decided opinion that no division, and especially in the circumstances of the Court of Session, should consist of less than four judges. In the first place, that is allowed in England as the right number, and upon this clear ground, that there is no other number which will to such a degree give you an authoritative majority—namely, 3 to 1; and at the same time give you judges acting individually under responsibility, where each must necessarily take a part in the proceedings, or be remarked as not doing his duty. They certainly may be equally divided, and in that case you must call in other assistance to solve the difficulty, but in the ordinary case of division it will be three to one, which is a more influential majority than a division of three to two, or any such numbers as those. But with respect to Scotland and the jurisdiction of the Court of Session, the thing is still more clear, and, in fact, in many cases it has turned out to be so, for the number of the judges of the court has been sometimes accidentally reduced to three, and then you have perhaps a lord ordinary deciding for the pursuer; the other party appeals to the inner house, and the inner house is divided two to one; the pursuer has one judge for him and two against him, and therefore there is no authority for the decision in the inner house, that is, there are two judges in the inner house against one in the inner house and the Lord Ordinary in the outer house—a very undesirable result—very undesirable with regard to the particular case decided, and very undesirable with respect to the law.

75. Such being your opinion with regard to retaining the same number of judges in the inner house, do you think that the lords ordinary might be superseded altogether?—No, I think not; I think you could not carry on the preparation of causes before the Court of Session, and I do not see how anything can be satisfactorily substituted for that preliminary preparation.

76. *Sir T. D. Acland.*] That preliminary preparation has been always the course of the law of Scotland?—It has.

77. And it has not been touched by any of the Acts of Parliament which have been passed?—No; and it was for that reason that I went back to the period before 1808, and showed that that system of the lords ordinary acting in the preparation of causes, and deciding them in the first instance, in point of fact existed then. That was the reason why I stated what the system was before 1808, as showing the original constitution of the Court.

78. *Chairman.*] Then if the lords ordinary could not, in your opinion, be superseded, with due regard to the administration of justice in Scotland, is it your opinion that the number of five might in any way be reduced?—My own opinion remains what I have expressed upon that subject, that I do not think they can be satisfactorily reduced; and there is an opinion entertained in some quarters, that the change has gone too far in striking off the two that were struck off in 1830. Perhaps I may be prejudiced from seeing the way in which the business of the court is carried on; but looking at the Court of Session in Scotland, I think that upon the whole it has given satisfaction, with the exception that I have thought it necessary to state. The decision of the Lord Ordinary I consider of very great importance; it is a decision which, in many instances is perfectly satisfactory to all the parties; it is obtained shortly and cheaply; and that I am here not speaking upon any random statement, I may mention that in the Law Commission of which I had the honour to be a member, we ascertained that, upon the average of litigated cases in which judgment had been pronounced upon closed records, two-fifths were finally decided in the outer house, and in some cases a half, so that the determination of a single judge, such as my Lord Jeffrey, or my Lord Moncrieff, before whom the cases had been fully and anxiously heard, and who had bestowed the greatest possible pains in the decision, and issued a note accompanying the judgment, was so satisfactory, that in many causes one-half of the cases have been settled in

in the outer house. The judgment being satisfactory to the parties has concluded the cause without an appeal to the inner house, and therefore without the possibility of appeal to the House of Lords. It is impossible, therefore, for me to say that the benefit of lords ordinary as a constituent part of the Court of Session, deciding cases and not merely preparing them, is to be lightly superseded; I see no ground for it, and if they are to be employed, not only in preparing the records, but deciding them in the first instance, their decision being subject to appeal, I do not think it possible to do with a less number than we have now. On the other hand, I do not think that you can diminish the number of divisions, because I think if the cases were heard in the divisions as they are in the outer house, it would occupy the time of both divisions almost through the whole year; they do not now require so much time in the hearing, because counsel are generally satisfied that the parole argument should be reduced to a shorter compass. But if the divisions were to hear the cases at that length to which I think it will come eventually, when we have grown out of the habits created by the old system, I think that they would be found to be fully occupied in sitting in court. How can I form a different opinion when I see the length of time that a case is heard in the House of Lords, and the satisfaction that suitors have in consequence?

79. Sir *T. D. Acland*.] With respect to the number, will you state why five lords ordinary are necessary with respect to the quantity of business?—That necessity arises from the number of cases that come into the Court of Session, and from what I know to be the great consumption of time that it takes lords ordinary to prepare the causes in the first instance, and to hear them and decide them. The parties have the choice of the lord ordinary and of the division; a party coming into the Court of Session may say, I wish the case to come before Lord Moncrieff, and after that I wish it to go before the first division, or before the second division, or, on the other hand, before Lord Jeffrey. As regards the business before the lords ordinary, there is always a great arrear of causes; and if they were distributed, I do not think they would be able altogether to clear that arrear. Some of them have no arrears, or hardly any, because they happen to be ordinaries that are not so much favourites of the public as the others; and I am not sure whether the arrangement introduced last year, giving suitors such an absolute choice both of the ordinary and of the division, may not be attended with prejudicial effects. But giving an opinion upon the propriety of continuing the number of five lords ordinary, I suppose the business to be distributed among the five; I suppose the causes to be prepared by them, the difficulties in the preparation that now occur continuing to exist; I suppose the causes to be heard by the lords ordinary with the same patience and attention as they are now heard by my Lord Jeffrey and my Lord Moncrieff, and indeed by all the lords ordinary; and I do not think, in that state of things, that I can say that the number could be advisably diminished. It may come to be a question whether four men with more exertion may not do the business which five men may do with somewhat less exertion; but the question is as to the efficient working of the court which is constituted of this number, and, above all, of the necessity of making a change where you have been going through a long series of changes, and have come to a pause. I own, that for my own part, I wish the thing to be brought to a pause; and I hope the Committee will bring it to some such pause, because I feel that the court is hurt by those constant changes; it affects their character and that of the judicature much more deeply than people in general are aware of.

80. Are the five lords ordinary always sitting?—The lords ordinary sit four days every week, and they are all sitting; the Court of Session never sits on Monday; but every lord ordinary sits four days in the week, so that there are always four out. Monday is generally occupied by the Court of Justiciary. The Bill Chamber is open for business every day.

81. Sir *W. Rae*.] Four sitting at the same time are as many as is convenient for the bar?—Sometimes they cannot sit on account of the bar.

82. Sir *T. D. Acland*.] Do the lords ordinary take the Exchequer business?—Under the arrangement of the last Act, they do it under certain rotations; the two judges who now officiate in the Exchequer are both lords ordinary; but the Exchequer must do its business upon Monday, and on other days on which they can find room for it; the Court of Session will not stop its business for the Exchequer. With respect to the extent of business which comes before the inner house, I see it has been stated, that in 1829 (and I dare say accurately), the first division had before it papers which they were bound to peruse, which I presume

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they did peruse—to a number amounting in quarto pages to 17,365, and the second division of papers, amounting to 19,266. I do not know the amount during the last year, but I think it would be very great; and I would suggest, that the Committee should order a full copy of the papers laid before the judges of the Court of Session for the year 1838.

83. Sir C. Grey.] Can you state what is the arrangement of the business, beginning with the month of November; for what period the judges sit in the two inner chambers, and as lords ordinary; when they go upon circuit, and when they sit as commissioners of teinds and when they sit for Exchequer business?—The matter is now regulated by the 2d and 3d of Her Majesty, c. 36. Last year the outer house met on the 1st of November, and the inner houses met on the 12th of November. The inner houses rose on the 12th of this month, the outer house will rise on the 20th, both having had a vacation of three weeks at Christmas, though there were jury trials and justiciary trials during that period. The whole court meets again on the 20th of May and sits till the 20th of July. The lords ordinary then commence the winter session on the 1st of November, sitting till the 20th of March, with the exception of the Christmas vacation. The inner house meets on the 12th of November, sitting till the 12th of March, with the exception of the Christmas vacation; but there are jury trials and justiciary trials before and after the sittings of the inner house.

84. Dr. Stock.] Are the vacations different of the different judges?—Yes; but I forget the particular day; the business of the Teind Court is principally done every fortnight, during the sitting of the court, upon the Wednesday.

85. What is the average number of hours during which the Court of Session sit which by Act of Parliament it is obliged to hold its sittings?—It is difficult to say; Upon the average, I should say the inner house sits about three hours or three hours and a half; that is to say, from half-past 11 to half-past two or three; the lords ordinary sit almost every one of them from nine to two.

86. Taking into consideration the proportion of time in which the judges of the inner and outer houses are respectively occupied, did it ever occur to you that the system might be improved by having those lords ordinary and only one division of the inner house?—I do not think that would be an improvement, because what I find fault with is, not that the judges of the inner houses are too many for the business, but if the business was done by that mode of hearing which I wish to see carried into effect, the causes would occupy the two inner houses; the judges come prepared from reading the papers to give their opinions, and in consequence of their giving short opinions instead of that full opinion which I think is required for the satisfaction of parties, the time occupied by the court appears to be small. Nothing could be more erroneous than to judge of the work done by the judges from the number of hours that are occupied by them in court.

87. When the facts of the case are to be ascertained, does it frequently happen that the judge deciding the case must enter into the investigation of matters of fact, or how are the facts ascertained?—In some cases proof is taken by commission, in other cases very difficult questions of fact arise, where there is no dispute upon parole testimony, but where the whole depends upon the import of writing.

88. How is the proof obtained in cases where there is no trial by jury?—If the parties do not settle the matter by admission, or restrict themselves to written evidence produced, the proof must be taken on commission.

89. Have the lords ordinary the power of examining witnesses *vidæ voce*?—They have the power, but they never do it.

90. Where there is a dispute about facts, there must be an issue tried by a jury?—Yes, or a proof by commission.

91. Dr. Stock.] If the witnesses are not resident in Edinburgh, the evidence of witnesses must be taken by commission?—Yes, written depositions are taken by a barrister.

92. Mr. Wallace.] What is the mode of proceeding in cases which originate before justices of the peace, sheriffs of counties and borough towns, when appealed to the Court of Session?—We have few cases of justices of the peace coming before the Court of Session, but in an important class of cases that come before the Court of Session in the way of review, the sheriffs of counties exercise a very important original jurisdiction to any extent, as in questions of debt, questions of nuisance, and possessory questions of all kinds.

93. When the sheriff has decided a case, the party that thinks himself aggrieved by the decision may bring the case under review of the Court of Session in various ways,

ways, by what we call "advocation," which brings up the record of the sheriff for judgment by the Court of Session; and if the record has been made up in the inferior court, nothing is done but to admit that, and take the judgment of the Court of Session upon it after argument; or the review may be by suspension or reduction?—

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94. Mr. *Pigot*.] Does the record contain the whole evidence and judgment?—Yes.

95. Sir *C. Grey*.] Does that go to the inner house?—To the Lord Ordinary.

96. Mr. *Wallace*.] Is the Lord Ordinary the first court of appeal from the sheriff?—Yes.

97. Does not an appeal lie in the first instance to the sheriffs resident in Edinburgh, from their courts in the counties?—An appeal lies from the sheriff-substitute to his depute.

98. The Court of Session then come to review that which has been already reviewed by a stipendiary judge?—Yes.

99. The review first comes before the Lord Ordinary?—Yes.

100. Then the next stage is to one of the inner houses?—Yes.

101. And then if the party be not satisfied with that judgment, an appeal lies to the House of Lords?—Yes, except as regards matters of fact.

102. So that the Court of Session has the power of general review over all the local courts in the country?—Yes; and I may mention, that, in the proceedings which took place before the law commissioners in Scotland, and a great deal of evidence was examined upon that subject, though there were many witnesses who were very anxious to extend the jurisdiction of the local courts, yet I do not think there was any witness according to my recollection, and I am sure not a witness of any weight, that proposed to cut off the jurisdiction of review from the Court of Session.

103. Have you completely explained to the Committee what is implied by this remark in the first report of the commission of which your Lordship was a member: "It is impossible, we think, to doubt that there has been, for some time past, a general and increasing dissatisfaction throughout the country with the mode in which justice is at present administered in the Court of Session;"—you will also observe what follows: "It seems to be generally felt, that the advantages which were anticipated from the enactments introduced by the Judicature Act," that is the Act of 1825, "have not been realized to nearly the extent that was expected, and there is not merely room but an absolute necessity for some material reform"?—Accordingly we suggested a great deal of reform, some of which has been carried into effect in consequence of our report, but I do not know that any dissatisfaction exists in the country, or in the profession, except in the way that I have already stated it to exist; and I think that cause of dissatisfaction will be removed as soon as the business of the Court of Session is conducted in a different mode. I think a good deal is owing to the habits of judges formed under the old system. I think, too, that the practice of the court has been improving, and giving more satisfaction.

104. Dr. *Stock*.] Have not the two thousand decisions that have taken place upon the acts of sederunt tended to remove objection by settling the law?—No doubt the proceeding is now very well settled, and I really will say, as a lawyer, that I defy the human intellect or any number of men to make acts and regulations for business which are not open to question till such time as you have settled it; you cannot avoid questions; and I hold it to be no disparagement to the judges that the acts of sederunt, which they were bound to make for their own procedure, should in the course of a great number of years have given rise to so many questions; but what I mentioned that for was to show that we should pause before we change the form of procedure, and not think that we are dealing with trifling matters.

105. Sir *W. Rae*.] As regards legislative remedy there can be no law passed to compel the judges to listen more patiently than they do at present to parole argument?—No.

106. Would you propose any limitation of their power of ordering cases?—No, I am not prepared to propose any remedy, because I think that must be left to the discretion of the judges; and I have not been well understood if I have not expressed my opinion, that, very much in consequence of the old habit, I think they have not listened sufficiently to parole argument; but other people may differ about that.

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that. I would not propose to limit them by a new legislative enactment. I look to our getting gradually rid of the old practice.

107. Mr. *Horsman*.] When your Lordship speaks of the old habits of the judges, what does your Lordship mean?—I mean the habit of forming opinions of a case upon written pleadings, which were very full, and which led the judges to expect that they would derive little or no assistance from the bar.

108. Not having those written pleadings, and not being able to make up their minds upon the case before they come upon the bench, does the impatience they display there lead them to do great injustice to the parties?—They have the elements of making up their opinion upon the case; they have not got into this state of training that they will look upon them as simply materials, as a mere narrative, till such time as they hear the case fully explained and unfolded by the arguments of counsel, but from the habit of making up their minds in studying cases at home, some of those judges of longest continuance on the bench will necessarily come to a strong impression, which makes them think a parole argument to a certain extent superfluous; and therefore they may appear to supersede that argument more willingly than they ought to do; the judges who have not been so long trained to that habit, I mean the judges in the outer house, hear the parole argument more patiently.

109. Is there not an impression among the profession that cases are very imperfectly heard, and that injustice is done?—Whenever a case is imperfectly heard injustice must be to a certain extent done. I think injustice must be done where, after an imperfect hearing, even a correct judgment is arrived at; because a judge ought to give the parties the impression that he has decided after full and satisfactory hearing; and therefore, even where the decision is right, injustice to a certain extent is done; and in such a case disappointment is increased. But I dare say injustice may be done in some cases, because, if there had not been an imperfect hearing, a different result might have been produced. I think there is an impression in the profession that the hearing in certain cases in the inner house is not satisfactory.

110. Do you think the diminution of business of the Court of Session may be at all occasioned by what you have stated of the unsatisfactory hearing?—I am not prepared to say that it may not have had that effect; I cannot say to what extent it has.

111. Sir *W. Rae*.] Are you prepared to say that there has been any diminution of the business of the court?—I stated that my impression was that there had been, but I cannot trace it to any permanent cause.

112. Are the counsel in no case unnecessarily tedious and lengthy in their argument, giving some reason for that impatience of the judges with a view to the proper discharge of the business of the court?—Decidedly—very often it is the fault of the bar; I have said that I never knew a case in which a counsel of eminence and authority at the bar was not able to obtain a hearing.

113. Dr. *Stock*.] Is there a limitation to the number of counsel that may be heard?—The fullest argument we have is by two counsel on each side being heard, the junior opening.

114. Mr. *Wallace*.] Is it not much more common for one counsel only to be heard in the inner house?—It depends very much upon the senior; I direct my junior to open as I think may be most advisable for the case.

115. Sir *C. Grey*.] Has the proportion of the reversals of decisions of the inner chambers increased of late years, or diminished, upon appeals to the House of Lords?—I am not aware, but I do not think it has been increased.

116. Mr. *Horsman*.] Are the present judges fully occupied?—I cannot tell to what extent the judges in private study and read their cases, but they have that which would fully occupy them; and the only point in which I have to state any thing about their not being fully occupied, is that more time should I think be given to the hearing of cases in court than is practically given.

117. Mr. *Wallace*.] With regard to the notes which are sent by the lords ordinary to the inner house, if I understand you correctly, the inner house as a Court of Review reviews the note of the Lord Ordinary rather than the cause as generally exposed by counsel?—No, I have not so expressed it, I think.

118. Do you admit, or the contrary, that the notes of the Lord Ordinary form the chief matter of consideration in the judgment of the case before the inner house?—No, I cannot admit that it forms the chief matter of consideration, it is considered

considered along with the record. It receives all that consideration which is due to an explanation more or less full of the grounds of the judgment of the judge who pronounces the decision.

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119. With regard to witnesses appearing in certain cases in the outer house, are witnesses summoned at all in the trial of cases before the Court of Session?—Not unless the cases are tried in the jury court.

120. Can you inform the Committee what proportion the jury cases bear to the whole number of cases tried in the year?—The number actually tried by jury are very few; I have had some returns of them; the institution has not been popular.

121. Is there not a great dissatisfaction with the profession, as well as with the public, at the present mode of trying civil causes by jury in Scotland?—Such mode of trial is very unpopular at this moment.

122. How do you account for the dissatisfaction of jury trial in Scotland?—I do not know that I can very well account for it; I do not think it is reasonable in the extent to which it goes; but it is a new institution, and never was a popular one in Scotland.

123. Is not the expense of jury trial very greatly more than the other modes usual in Scotland?—That depends upon a great many circumstances; it was a great argument for the introduction of jury trial (to a certain extent I thought it a very just and true argument), that the expense upon the whole matter would be less, though the actual outlay in each case would be more immediate; and I believe the circumstance of the expense coming more immediately upon the agent of the party has been one of those things which made it more unpopular than if the expense had been even greater but more slowly doled out; but this is a very large field of investigation.

124. Is not the expense very much larger in jury cases in Scotland than in cases tried in the ordinary manner?—I do not know that; it depends upon the nature of the case. If you take an important case and try it by jury, though the expense may be considerable, my opinion is, that the expense would be a great deal less than if it were tried according to the old form in Scotland by commission, where I have known proof taken upon commission. Take an important case, such as the Cromarty Fishing case, or any case of great intricacy, the proof upon commission may extend over years, and is a thing of enormous expense in the result, though the party is not put to an immediate and actual outlay. I dare say in many of those cases of jury trial, where the expense has seemed to be considerable, the pressure upon the party may appear to be greater because he is obliged to pay the money at once; but the expense in the whole has been actually less.

125. Of cases generally tried by jury, as compared with cases generally tried without a jury, is not the one more expensive than the other?—I cannot institute a comparison. Jury cases are expensive; but with what class of cases am I to compare it? Where there are commissions, the expense in the Jury Court will be often less considerable.

126. Dr. Stock.] As to the number of cases tried in those two forms, can your Lordship give any proportion?—I cannot; the cases tried by jury are very few; I cannot answer that better than by saying that jury trial has really not got into the ordinary system of Scotland.

127. Sir W. Rae.] Are not a great portion of jury cases compromised immediately before trial?—A great many of them are.

128. Is there any particular reason for that?—One reason has been very often assigned, and I believe it operates to a very great extent; the fear of failure, where failure is certain, makes a party afraid, and he does not go on.

129. Is it supposed in Scotland the juries attend to the opinion of the judge as they do in England?—I am not very sure about that; I should think not; I think the juries are, or are thought to be, too little under the control of the court, for the full advantage of jury trial under the influence of counsel.

Veneris, 20<sup>o</sup> die Martii, 1840.

## MEMBERS PRESENT :

The Lord Advocate.  
Sir William Rae.  
Dr. Lushington.  
Mr. Wallace.  
Sir George Grey.  
Dr. Stock.

Lord Teignmouth.  
Sir Thomas Dyke Acland.  
Mr. Horsman.  
Sir Robert Harry Inglis.  
Mr. Pigot.

THE HON. FOX MAULE IN THE CHAIR.

The Right Hon. The Lord Advocate of Scotland, a Member of the Committee,  
further Examined.

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Lord Advocate.  
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130. Dr. *Lushington*.] WHAT do you consider to be the chief cause of the number of appeals to the House of Lords?—That is a very large subject, and I am not prepared to say that I could enumerate at present all the circumstances that I think lead to the multiplication of appeals from Scotland, making the number of appeals from that country greater than from any other division of the empire, I believe, from which an appeal is generally taken to the House of Lords. I consider that one very important cause is the nature of the appellate jurisdiction itself; that there is an appeal, in a certain degree, to a foreign tribunal, instead of, as in the case of England, an appeal from one English tribunal to another English tribunal, or in Ireland, where the same remark applies. But I have no hesitation in saying, that I think one important cause of so many appeals is connected with what I stated before, that the judges of the Court of Session do frequently not give at sufficient length the grounds upon which their judgment proceeds; and I have the less difficulty in stating this as a cause of appeal (and I dare say my learned friend, Dr. Lushington, who has had great practice in the House of Lords, will agree with me) inasmuch as it has very often been observed in the House of Lords, that the judges have not shown satisfactorily the grounds upon which the court below acted; and this does bear upon the whole matter of the greater part of the judicial business being done in private, which I think is the fault of the present system. I wish, therefore, that *viva voce* pleading were more enforced, because I should like more of the judicial business to be done in public than is at present done; I think it would be more satisfactory to suitors and to the profession; I think it would prevent the imputation which has sometimes been made, whether with cause or without cause, that the judges do not bestow that attention on the cases which they ought to bestow. If that time is given in public there can be no question; but if given in private, it may be said that a judge who does not like to work to the same degree as his colleagues, may spare himself the pains of exercising his own mind in the decision. In my view, it is of the last importance, I think, that the grounds of the judgment should be very fully stated at the time the judgment is given.

131. So that in point of fact one of the principal causes of the number of appeals has been, not that the decrees in themselves may not be sound and according to the law, but that either the reasons stated have been insufficiently stated or have been erroneously stated?—I must say that that is a frequent cause, in my opinion; and I have observed in my evidence before, that sometimes when counsel on both sides have been satisfied that the judgment is right, they have been equally dissatisfied, and the suitors dissatisfied, with the rapid and cursory manner in which the case has been disposed of.

132. Dr. *Stock*.] Your Lordship has mentioned as one of the causes of the multiplication of appeals from Scotland, in proportion to those from Ireland and England, to the House of Lords, that the appeal is to a judge who might be considered as a foreign judge not conversant with the Scotch law. Will your Lordship explain how that affects the multiplication of appeals?—That is very clear. Suppose a case

case is decided according to the law of Scotland, and a party thinks his case is even rightly decided according to the law of Scotland, he takes the chance of any distinction which may exist in the English law.

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133. He speculates upon the incompetency of the tribunal to which he appeals?—No. I should hardly call it the incompetency; but that the law with which the tribunal is most familiar may give him a chance which in Scotland he may not have had. But I must qualify this answer by saying, that the House of Lords in deciding cases, whatever may be the views of the parties coming before them, are always as much guarded as any tribunal can be, to decide Scotch cases according to the Scotch law. I should do great injustice if I did not state that to be the firm conviction that I have from my experience in the House of Lords.

134. Sir *W. Rae*.] Are cases frequent of a judgment being right, and the judges pronouncing bad reasons?—I should hardly say bad reasons, but insufficient reasons; not assigning the ground of judgment sufficiently.

135. Is this consistent with the former answer made?—I think, so far as I recollect the terms of the former answer, there are cases appealed upon the ground of erroneous decision, and I think rightly appealed; and cases appealed upon the ground of erroneous decision have, I think, been rightly, in many cases, reversed; in many cases of reversal, in the majority of cases of reversal, I am very much inclined to think, that, upon the whole, the House of Lords have been right; but in speaking of the frequency of appeals with regard to the way in which the grounds of the judgment were stated, I did not mean to state, that the grounds of a decision right in itself were bad, but that they were imperfectly stated; stated in part by one judge, and stated in part by another judge; not fully or perfectly stated anywhere, and that there was an appearance of inconsistency; this is a point which has been adverted to again and again in judgments of the House of Lords; I have known cases remitted, and recently, to the Court of Session which were held to be cases of difficulty, and the remit has been put upon the want of explanation contained in the reasons given for the judgment of the court below.

136. Dr. *Stock*.] Do not the printed cases before the House of Lords in a great measure supply that defect?—They supply that defect so far as the arguments of parties can supply that defect, but still what the House of Lords often want, and very much require, as an appellate tribunal, is not to find out in the conflicting arguments of parties how the judgment can be supported; they more often wish to know the particular grounds upon which the court below wish to place that judgment.

137. Mr. *Wallace*.] Does your opinion regarding the judges not giving sufficient time, and sufficiently expressing their opinions, involve the question of their sitting longer in court daily; are you of opinion, that, to obtain the object which you have in view, it would require the judges to sit longer in court daily?—It follows as a matter of course, when I state that I do not think a sufficient quantity of judicial business is done in public, that I think they ought to sit longer in court daily, and occupy part of that time which they may now give at home to the reading of the cases in hearing arguments *viva voce*.

138. Is there any limit to which you would propose that the courts should come; would you propose that they should sit at an earlier hour, and, generally speaking, that they should sit also to a much later hour than at present?—What I have said generally is this, that it appears to me that to give full and proper effect to the change introduced in 1825, there should be a much greater extension of *viva voce* pleading; and, further, that there should be a much fuller statement by the judges of the grounds upon which they give their judgment; of course that would occupy them longer in court; I am not prepared to say, with reference to the convenience of the whole court, when they should meet, or when they should rise, but there should be more time spent in court, especially by the inner houses.

139. *Chairman*.] And the result would be, of course, that the court would sit longer in public than they do at present?—Yes.

140. Sir *W. Rae*.] Is it the general practice at present for the court to prevent the counsel from stating that which they consider necessary for the information of the court?—No, I do not know that it is; but the counsel act under the impression that the argument is useless in many cases, because they argue under an impression that the judges have made up their minds already at home.

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141. *Dr. Stock.*] Your Lordship stated that it had been suggested that the judges should not have the opportunity of reading the printed papers before they had heard the parole argument; what is your Lordship's opinion upon that?—My opinion is against that, because a great deal of benefit may be obtained by a judge having a general knowledge of the case before he goes into court, provided he does not allow the knowledge of the case derived from the statement of the facts and the summary of the pleas of law to make too deep an impression upon him, or to disincline him to hear the counsel at full length; but I think it would not be with advantage to withhold the papers from judges before they came into court; and I stated that such a suggestion had been made simply with a view to show how strong the feeling with a part of the profession is as against the mode in which cases are disposed of.

The Right Hon. Sir *William Rae*, Bart., a Member of the Committee, Examined.

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Sir *William Rae*,  
Bart.

142. *Chairman.*] YOU were Lord Advocate of Scotland in the year 1825, when the Act was passed which changed the mode of hearing and deciding cases?—I was.

143. Did you anticipate when that Act was passed that it would come into immediate operation, and that the mode adopted by the judges of dealing with cases before the Court of Session would be instantaneously changed?—Perhaps I may mention that that Act originated, not in a complaint from Scotland of the mode of administering justice, but in a complaint from the House of Lords of the number of appeals, and particularly on the part of Lord Eldon, who at that time thought it necessary to propose that an additional judge should be appointed in the House of Lords for the disposal of Scotch appeals in particular. It was thought wise, in order to ascertain the grounds on which so many appeals occurred, that a Commission of inquiry should be appointed, and an Act of Parliament was passed specially authorizing the nomination of such a Commission; this was in 1823, the 4th of George the Fourth, chap. 45. The grounds on which it was considered at that time that appeals chiefly arose were three; first, irregularity in making up the record. This is alluded to in the evidence of the Lord Advocate on the previous day; facts were not fixed at the outset of the cause, but were brought forward as occasion might occur in the whole progress of it: that was one reason. Another reason was, that a great number of judgments in the same cause were pronounced, first by the lords ordinary and afterwards by the inner houses, often varying from one another, and leading to the belief that they had not been very duly weighed at the time, possibly under the impression that they might again come before the judge for consideration. And the third reason was the constitution of the court at that time; the divisions consisted each of five judges, so that in many cases the decision was by a casting voice, and if the Lord Ordinary concurred with the minority, the judges were equally divided in opinion. Those were the reasons that were at that time felt to lead very much to appeals; and in order to correct those evils it was thought wise not to limit the Commission to individuals connected with the law in Scotland, but to embrace in it several from England, so that as much of the English practice might be mixed up with ours as might be deemed expedient; accordingly that Commission was made to consist, besides the chief judges and other high officers of the law in Scotland, of Sir Nicholas Tindal, Chief Justice of the Common Pleas, Mr. Justice Littledale, the Earl of Devon, then a chancery lawyer, Sir William Alexander, afterwards Chief Baron of England; and they were assisted in Scotland by Sir Samuel Shepherd, who had been long Attorney-General in England, and by Mr. Adam, the chief commissioner of the Jury Court, who had also been an English counsel. This Commission, of which I was a humble member, made an anxious inquiry as to the practice of the courts in Scotland in every department, and they made a report in the early part of the year 1824, upon which the statute of 1825, the 6th of George the Fourth, chapter 120, was founded, and gave effect to their recommendations; it provided a remedy for the three evils to which I have referred; it introduced a fixed record, by means of a summons on the part of the pursuer, carefully drawn, containing all the facts and conclusions of the case, and defences by the other party, drawn with equal care, the parties being tied down to the statements therein contained, and the defences being accompanied with the pleas of law arising out of the summons and defence; if the parties were satisfied with that statement,



statement, the record was thereupon closed; if there was a difference in point of fact, a further paper was to be ordered, namely, a condescendence and an answer, which two papers were to be revised by the parties till they were satisfied, and then the record was to be closed. This was considered as the best species of record which could be framed; and the Commission which I have referred to, in their report, recommended it as forming "a system of pleading and preparation of trial better adapted to the peculiarities of the Scottish jurisprudence, and more congenial with the habits of the people, than any attempt to imitate the English practice of special-pleading." I believe that this mode of making up the record has proved in practice highly beneficial, and I am strongly impressed with a belief that it has tended materially to diminish litigation, because counsel are very frequently, nay generally, consulted in the preparation of the summons, and always of the defences; and thus from the early consultation with counsel, many cases are stopped *in limine* that would otherwise go on to be discussed in court. Then the other evil with regard to repeated judgments was cured by its being declared that the judgment of the Lord Ordinary upon that record, after hearing counsel, should be final as before him; and again, when the case should be appealed to the inner house, that the record as made up before the Lord Ordinary should be carried to the inner house; and that there the one judgment pronounced should be final. With respect to the number of judges, it was proposed to alter that from five, of which each of the divisions at that time consisted, to four, which, from what was stated to the Committee on the last occasion, I concur entirely in thinking is the most expedient number for the court to consist of, as leading to the majority of three when the court is divided in opinion, and when equally divided, other judges being brought in to dispose of the case. That Commission did not recommend any reduction in the number of judges, but simply a reduction of the number in each of the divisions of the inner house; and they suggested that the two supernumerary judges should be added to the lords ordinary of the outer house; and, accordingly, from 1825 down to 1829 there remained seven lords ordinary acting in the outer house. In 1829, a question was brought forward in the House of Commons regarding the increase of the judges' salaries, and this was objected to, at that time, upon the ground that sundry recommendations of a Commission which had been established many years before, in regard to alterations in the judicial establishment of Scotland, had not been carried into full effect. In consequence of this, the proposal for increasing the judges' salaries was put off until a Bill should be introduced for carrying those alterations into effect. The Government of the day required me, as the Lord Advocate of Scotland, to go over all those suggestions, and to report, not merely as to the propriety of them, but, upon my responsibility, and upon the responsibility of the Government which might hereafter adopt them, what reductions could with propriety take place in every department of the judicial establishment of Scotland. In consequence of that direction from Sir Robert Peel, I, with the aid of the then Solicitor-general, now Dean of Faculty, made a report the particulars of which I shall not go over, but it contained this suggestion, that a reduction of two lords ordinary of the Court of Session should take place, namely, the two supernumerary lords ordinary who had been added to the five judges who sat in the outer-house previously to the year 1825; the main reason for that recommendation was, that, in so far as I was able to discover, the business of the outer-house had been from 1810 down to 1825 sufficiently performed by the five lords ordinary, and, as that business had not increased, it was considered that the two supernumerary ones might be dispensed with; and I do not understand, from anything that has since passed, that that reduction of the number of judges was inexpedient. In consequence of that recommendation, the statute of 11th George the Fourth and the 1st of William the Fourth, chapter 69, passed, which vested in the Court of Session a variety of duties which before did not belong to them; it abolished the Jury Court, which was a separate court, and vested the trial by jury entirely in the Court of Session; it abolished the Court of Admiralty and vested its sole civil jurisdiction in the Court of Session; it abolished the Consistorial Courts and likewise vested all the consistorial judicature in the Court of Session; prior to that time the judgments of the Admiralty and the Consistorial Judges were subject to appeal to the Court of Session, but they did not in the first instance come before that Court.

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144. Was not one object of the statute of the 6th George Fourth, chapter 120, to substitute oral pleadings for written arguments?—It was to a very considerable  
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able extent, I do not say entirely so, because there was a power given either to the lords ordinary or to the inner houses to order cases, which were written arguments.

145. Do you consider that the spirit of that Act has been carried out in the Court of Session?—I must speak with great hesitation upon that subject, as I have no personal knowledge in regard to it. As a Privy Counsellor I was prevented from returning to the bar in 1830, even if I had been so disposed, and therefore I can only speak from the information I have received from some of the heads of the profession in the court of Scotland, with whom I am in confidential communication, and whose opinions I am well acquainted with. I believe that, particularly at first, the *voir dire* pleadings were not relied on by the judges to that extent that was desirable; but I have reason to believe that that has been gradually remedying itself, and that now the ground of complaint exists to a very small extent. I believe that there is not a degree of complaint on this head to the extent which the Lord Advocate stated in his evidence; and as reference has been made to an opinion which the Dean of Faculty had expressed in reference to that matter, and particularly with regard to the impatience manifested by the judges, and their not sufficiently attending to the arguments at the bar, I may mention that I have a letter from him, dated the 16th of last month, in which he says, explanatory of that passage in his evidence before the Law Commission, that that evidence was given in the year 1833, seven years ago; that it related not to judges not being willing to hear, but to some of the older ones, now mostly dead, namely, Lord Balgray, Lord Craigie and Lord Cringletie, and others, thinking that they were bound to study the cases, under the new system, at home before they came into court. A hint which the Commission wished me to give upon that subject was taken, and there is not now complaint upon the subject. That is the impression of the Dean of Faculty.

146. Dr. Lushington.] So that in point of fact, to the best of your information and belief, written arguments are not now ordered more frequently than is necessary, considering the importance and difficulty of the particular cases in which they are ordered?—That is my impression from the information I have obtained.

147. Chairman.] Can you state, from your intercourse with the heads of the profession, whether this change, introduced in 1825, has given satisfaction not only to members of the bar but also to the public?—I believe it has upon the whole given general satisfaction. When changes in a system take place people are very apt to think that other changes would be better; but I do not see, and I have not heard, in what respect any change could be introduced that would improve the practice in Scotland. I think the evidence of the Lord Advocate the other day did not point out any alteration that would be desirable in the law as now regulating that practice; it only requires to be let alone.

148. Do you consider that the change of 1825 has tended either to increase or diminish the general business before the courts?—I think that it has, in some degree, tended to diminish it, for the reason I mentioned before, namely, by a strict examination being made, at the first starting, into the grounds upon which the cases stand, and a good many cases being in consequence suppressed which would otherwise have gone on to trial; I think in that respect it has diminished it. Again, more small cases are now carried before the sheriff than formerly; in other respects I do not see how the business of the court can have been materially diminished in substance, and I am rather inclined to believe that the same extent of important business which was before the Court of Session formerly still continues before it; and it does not appear to me from the returns that there are any grounds for considering that any material reduction of business has taken place; certainly the number of new cases have somewhat diminished latterly, but the business of the court I do not think has diminished, and particularly I judge from the number of cases at the end of the session that remain undecided. I see from the returns, that before the lords ordinary, where the number of new cases were diminishing in some degree, the extent of arrears was increasing. In 1836 the number of cases ready for debate not decided before the lords ordinary amounted to 55, in 1837 they amounted to 74, in 1839 they amounted to 146; in the inner house the cases which were ready for judgment undecided at the end of 1837 were 8, in 1838 they were 89, in 1839 they were 77. This leads me to think, that as the court performs the same extent of business daily, the real important

important and difficult cases are fully as numerous as they were formerly, and that no material reduction has taken place in the extent of business to be done by the judges.

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149. Then, in your opinion, no reduction has taken place in the business which would justify a reduction of the number of judges?—Certainly not.

150. Has any alteration taken place in the Court of Session which would lead you to think that the business could be performed as well by one division as by two in the inner house?—It is obviously impossible they could do so without lengthening the sessions; and if one division was to sit without intermission for the whole year round, they could not do more than the two divisions do at present; but considering the duties to be performed in vacation at circuit, and several other matters, it is quite impossible that one division could sit during the whole year. I am not prepared to say that the two inner divisions could not do more duty than they do; I think they could; but I do not think one could perform it, and I think it is better for the country that two divisions should be lightly loaded with business, than that one should be overpowered and incapable of discharging its duties.

151. In your opinion, would it be expedient or proper to reduce the number of judges in either of the divisions, or in each of the divisions?—I have said that it appeared to me impossible to reduce one division, for the reason I have stated; and I may mention another reason, which is, that I think it very expedient that the country should have the choice of two courts; I think it must lead to a degree of exertion upon the part of the judges themselves, and must be very acceptable to the country, that they have liberty to go to one division or the other, and therefore I am very decidedly of opinion that the two divisions ought to be maintained. With respect to their number, I have already said that I am quite clear that four is the proper number, and that you could do nothing so injurious to the administration of justice, as to reduce it to three, because you then bring it to the position stated by the Lord Advocate; you have a case decided in the outer court by a judge of the highest character, Lord Jeffrey or Lord Moncrieff; it goes to the inner house; the president perhaps agrees with Lord Jeffrey, and the two minor judges decide the case in favour of the adverse party. It is quite impossible that the adverse party can be satisfied with that judgment, and it must necessarily and unavoidably lead to an appeal to the House of Lords; those who wish to diminish the number of appeals to the House of Lords will perceive that this would form a fruitful source of such appeals.

152. In preserving the two divisions of the Court of Review, is it your opinion that the lords ordinary might be reduced in their present number?—I think, from the extent of the business they have to discharge, it would be quite impossible and most inexpedient, and that they could not discharge the business satisfactorily; the arrear of causes before them is now great, even when their sittings have been extended, because, by a late Act of Parliament, they begin to sit upon the 20th of October and sit till the 20th of March; but even with that, the arrear of causes before the lords ordinary has increased, instead of being diminished; and therefore it appears to me most undesirable that the number should be reduced.

153. Do you entertain the same opinion of the expediency of the public being allowed to choose their own lord ordinary as of their being allowed to choose to which inner house they shall appear?—Yes, I think it right that the parties should choose their own lord ordinary; a doubt was expressed how far it was wise to give them an unlimited choice of the lord ordinary, and of the division also, inasmuch as it tended to create a great inequality of business; I had doubts upon that, and I have still doubts upon it; but that does not go to the point of reducing the number of judges.

154. *The Lord Advocate.*] You mentioned very correctly that one of the important changes introduced in 1825 was that of making up the records; are you not aware that that part of the statute connected with the making up of the records with the condescendences and the answers has led unexpectedly to a very great multiplication of proceedings, and to a great deal of expense not anticipated, and that it is now a subject of very general complaint both by the court and the bar?—I see that that is stated in the Report of the Law Commission; personally I have no knowledge upon that subject.

155. Are you aware that, with respect to all that, the statute was very imperative, and that the Court of Session were not left with the power by acts of sederunt

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of remedying inconveniences which in the course of practice might be discovered?—Yes, the statute was very peremptory in fixing the description of document which was to form the record, and permitted no deviation therefrom; but it did permit the judges to make all necessary acts of *sederunt* in order to carry that Act into effect.

156. You consented to the reduction of the number of lords ordinary in the year 1830, upon the ground that five lords ordinary had been found sufficient to do the business before?—Yes, mainly on that ground; but so many as seven courts of lords ordinary sitting at the same time had also been found inconvenient.

157. Is it your opinion now that the *vivâ voce* pleadings have been quite carried to a sufficient extent under the operation of the statute of 1825?—I have said that I have no personal experience upon the matter; and after the opinion given by the Lord Advocate, I must certainly entertain doubts whether it has; but I think that if such an evil really exists, it will cure itself gradually, without any legislative enactment; that as younger men leave the bar, and become judges, they will go impressed with the feelings that it is desirable to extend *vivâ voce* pleadings, and that those feelings will gradually have their effect.

158. That of course would lead to the judges occupying longer time in court, hearing more parole argument?—It certainly would.

159. You are aware that the business of the Court of Justiciary has very much increased?—It has; very much, indeed.

160. And that the cases that come before the High Court of Justiciary, and before the Justiciary Circuit, are generally cases of the greatest magnitude?—Yes; for a great length of time no cases, with very rare exceptions, have been brought before the Court of Justiciary, where a less punishment, could be awarded than transportation or a long period of imprisonment; cases of smaller magnitude are generally tried by the sheriff, by means of a jury. By the Act which I last referred to, the 11th of George the Fourth, and 1st of William the Fourth, chapter 69, the trials before the sheriff were materially facilitated by dispensing with their taking down the evidence in writing, and in various other matters, which made the trials before this judicature very simple and easy. In consequence a large proportion of the criminal business in Scotland has been transferred to the sheriff; but notwithstanding that the business of the Supreme Court has most materially increased in that higher description of crime, arising from the increase of population, and of commerce and manufacture, and I think it necessarily follows, that as Scotland advances farther in those respects, crime will rather increase than diminish.

161. Mr. Wallace.] You stated that you did not consider the returns made to Parliament already, showing a very considerable decrease of business before the Court of Session, as any proof of its being decreased?—I said that the returns showed a decrease in the number of causes brought before the court, but that it did not appear to me to prove that the time of the judges in discussing those causes had been diminished.

162. Will you explain what you mean by that?—I find that the number of judgments pronounced by the lords ordinary do not vary materially; and observing the arrears of causes in their courts, I must conclude that they take much more time in discussing them; and as the business of the judges consists in the time occupied by them in considering their causes much more than in the number of cases brought before them, I have come to the conclusion that their business in reality has not been diminished.

163. Those returns appear to show a diminution of more than 25 per cent. in the number of causes which come before the courts; is the Committee to understand that you do not think the diminution, supposing it to be 25 per cent., is any proof of the court having less to do?—It depends very much upon the nature of the cases; the number of cases does not at all fix the extent of duty which is performed by the judges in disposing of them; and I infer from what I have already said, that the cases are of a more important nature and more difficult in discussion, and, of course, though their number is less, the duty discharged by the judges in deciding them is not diminished.

164. Are you, then, of opinion, that the making of these returns to Parliament is of no use?—No; I think they are of great use.

165. Of what use are they?—They show the number of cases brought into court, the number of judgments finally pronounced by each of the judges, and the number of cases in arrear; and from those circumstances you are able to judge of the extent of business before the court, and how it is performed.

166. You

166. You have mentioned a very considerable increase of arrears appearing by those returns; I find in your evidence in the First Report of the Law Commission in 1834, in speaking of the length of vacation, you say this, in page 10, Question 79; "The autumn vacation might certainly admit of reduction if necessary, but I believe in all courts there is a long vacation, and possibly on account of their age the judges require a certain degree of relaxation at one period of the year, and I am quite sure that a change would be very unacceptable to men connected with the law department." Bearing in mind this reply, and bearing in mind that a considerable number of the judges are six years older than they were, are you of opinion that the vacations, as regards all the judges, could be diminished with advantage in order to get rid of the arrears to which you have alluded?—I must answer the question first as regards the lords ordinary; in order to meet the arrear, advantage has been taken of a provision of the Act to extend the session; the winter session now begins upon the 20th of October, and ends upon the 20th of March, instead of beginning upon the 12th of November and ending the 12th of March; as regards the inner house, it does not appear to me that there has yet been any such arrear of causes as can render it necessary that the length of the session should be increased.

Right Hon.  
Sir William Rae,  
Bart.

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167. Then the Committee is to understand that it is not your opinion that under the existing circumstances the vacations ought to be diminished?—I do not think there is any call for it, but it is a remedy which the existing statute sanctions, and which can always be applied, if the extent of arrear of cases is such as to demand it.

168. Sir C. Grey.] What is the mode in which the summons and defence come before the Lord Ordinary for preparation?—I understand, that, after the counsel have revised those papers, they go before the Lord Ordinary for final adjustment; he hears objections to the record, and satisfies himself that it is right, and the record is then closed.

169. Dr. Stock.] In the progress of preparing pleadings and records under the system adopted in 1825, it must frequently occur that the condescendence and the other pleadings have to be amended and altered in their form, which must be done by the judge; when such objections occur, is it done by hearing counsel in open court or in chambers?—The Lord Advocate could answer that question better than I could do, but I understand that it is done in the presence of counsel on both sides.

170. Is there a debate in open court upon those points?—Constantly.

171. Sir T. D. Acland.] You stated that it was the practice for a party to select the lord ordinary before whom he will bring his suit?—Yes.

172. In point of fact, does a greater proportion of business come before some lords ordinary than others?—Certainly.

173. If the business were equally divided among the lords ordinary, would the same amount of arrear be expected to occur?—No, I presume not.

174. If the business were equally distributed among the lords ordinary, would it be possible for a less number of judges in ordinary to get through the business?—Certainly, if it was equally distributed, they would go through it more easily; but I am not aware, if it was equally distributed, looking at the amount of business, that you could dispense with one of them; and by a forced equalization we should lose a great benefit now enjoyed by the people of Scotland, namely, the choice of the Lord Ordinary; that is a privilege they value highly.

175. Sir R. H. Inglis.] Does the preference exercised by suitors in choosing the lord ordinary, and the division of the inner-house, correspond in practice with the preference exercised by the suitors in England in choosing the Court of Common Law in Westminster Hall, or the Court of Chancery, to which they will respectively carry their case?—I presume so, if the cause is competent before the judges in that court.

176. It could not be abolished in Scotland without depriving the suitor in Scotland of an advantage enjoyed by the suitor in England?—No.

177. Mr. Wallace.] Is not the change of giving suitors the choice a new one?—It is; formerly, there were three lords ordinary attached to one of the divisions of the inner-house and two to the other; the cases decided by each set of those lords ordinary came before the division of the court to which they were respectively attached, so that the choice was more limited, the party being obliged to take the division to which the Lord Ordinary proposed belonged; but in this way the business before the divisions was to a certain extent better equalized.

*Thomas Thomson*, Esquire, called in ; and Examined.

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178. *Chairman.*] YOU are one of the principal clerks of session ?—Yes, I have been so for about ten years.

179. To what division of the court are you attached ?—The second division.

180. Are you acquainted with the extent of business before both divisions of the inner house, or only before that to which you are attached ?—I know nothing but what concerns the second division, in which I sit.

181. Since you have been clerk of session attached to the second division, has the business brought before that division increased or diminished ?—Of late, within the last year or two, I should say rather diminished, so far as I understand the number of causes brought by reclaiming note before the court ; the amount of that diminution I cannot pretend to state with any accuracy.

182. Can you state to the Committee any cause of a permanent nature for the diminution ?—I think there is at present greater confidence in the judgments of the outer house than I have known to exist at some former periods, and that, I have no doubt, is a very important circumstance in diminishing the number of appeals ; what other causes there may be I do not know ; I understand (but of that I cannot pretend to speak with certainty), that there is a general diminution of business in the outer house, which would cause a corresponding diminution of cases brought by appeal into the inner house divisions.

183. Independently of the general diminution of business throughout the Court of Session, you mean to say that there has been a diminution in the general business of the inner house consequent upon the increased confidence which the public place in the decisions of the outer house ?—I venture to suggest that as a reason of the diminution ; it is only a conjecture.

184. Did you practice at the bar until you were clerk of session ?—For many years ; but I cannot say that my practice has been very extensive since 1825 or 1826.

185. Your practice was sufficiently extensive to bring under your cognizance the business of the court ?—Yes.

186. You are aware that, in 1825, a change was made by Act of Parliament in the mode in which business was done before the court ?—Yes.

187. That change was from a system of written pleadings to a system of parole argument ?—Mainly of that nature.

188. What has been the effect of that change from written pleadings to parole argument, before the division of which you are clerk ?—The first important result has been, that the allegations and pleas of parties have been prepared, or are supposed to be prepared, with more care than formerly ; one of the great objections to the former system was, that the allegations and pleas of the parties were not brought out with that precision which the due administration of the law certainly requires ; on that account, by abandoning the more voluminous system of argument in writing, and preparing a cause in a certain form, very severely and minutely provided for by statute, with a degree of rigidity that perhaps was not extremely wise, it was supposed that judges would be prepared to understand the case by oral discussion ; that was the first important result certainly of the change made, by what is commonly called the Judicature Act, the 6th of George the Fourth, chapter 120.

189. That Act still left the judges the power of having written pleadings in cases where they saw fit ?—Certainly, and they do exercise that power, though in comparatively a small number of cases.

190. Have the judges of the second division since you have been clerk of session refrained from exercising that power of calling for written pleadings since that Act was passed ?—Not refrained from it ; in many cases they have exercised that power where there has been a good deal of discussion at the bar upon matters brought out that did not appear previously upon what is called the record of the cause, and perhaps raising points of difficulty and nicety which have to be settled for the first time, and have not been discussed before the lords ordinary ; in such cases, I think it has been not very infrequent to order what are sometimes called minutes of debate, and sometimes more formal cases, arguing either the whole case or such portion of the cause as they may think fit to make the subject of more deliberate discussion.

191. Was

191. Was the object of the Act of 1825 in part to substitute parole argument for written pleadings?—Certainly it was. *T. Thomson, Esq.*

192. Do you think that in the second division, such object of the Act has been followed out to the full extent to which it ought?—I am quite aware that it has not been followed out to the extent that many gentlemen practising in court have been in the habit of expressing their wish for; at the same time for my own part, though I think a greater extent of verbal pleading might be desirable, it is but fit to understand that the judges have not been dispensed from the duty of studying the cases upon the written and printed papers before they come to be discussed or heard in the court. I believe, and I can say most conscientiously, that they appear to make themselves as much masters of the case before coming into court as those papers can possibly enable them to do, that they appear to have consulted the cases that are referred to, or for their own sakes to have consulted those cases which are applicable to the allegations and facts of the case, and in that respect it may be said that the judges come into court rather more than half informed upon the whole nature and merits of the case before it becomes the subject of discussion at the bar. In that discussion I am quite aware that counsel who have any tact at all very soon discover how far the judges are fully aware of the facts and the bearings of the case, and I dare say are very much restrained in the extent of their discussion on that account. It is very rarely, indeed, that it becomes necessary for them to open the case in a very formal or regular way by narrating the grounds of the summons, or the facts of the case upon which the pleas of the parties are to be founded, these being all embodied in the record, and it not being in the power of parties to go beyond the allegations and facts stated on the record; the judges having been previously aware of all this of course makes it not perhaps necessary, and certainly makes it a matter of feeling on the part of advocates who have any discretion, not to go over the case with that minuteness which otherwise would be indispensable. Whether that be a very advantageous mode of conducting judicial proceedings is more than I can presume to give any very decided opinion upon; but unquestionably the result of the present system is what I am endeavouring to state, that of obviating very much the oral discussions at the bar, and on that account I have no doubt creating a certain feeling of the insufficiency of those discussions, and discontent, inasmuch as parties may probably conceive that the extent of public discussion is very much a measure of the consideration that is actually given to the case. 20 March 1840.

193. Then the Committee are to infer from what you have stated, that the Act of 1825, to give increased oral discussion, has not been carried out to the extent the public had a right to expect?—I do not pretend to say what right they had to expect more than they have got, but they have not got it to the extent of their own wishes and desires, that I am aware of.

194. Can you state to the Committee whether you had observed any difference in the time the judges sit publicly in court between the period when you were practising at the bar, before the Act of 1825 passed, and since you have been clerk to the second division; do the judges sit in court a greater or less time now than they used to do formerly?—I am not quite sure that I can answer that question with any great certainty. I had occasion to practice in that court for many years before its separation into two divisions, and in that period certainly the discussions of the judges (for they were chiefly discussions on the bench) were much more protracted than they have been since; there might have been 15 judges present, there were seldom less than 13, the quorum being nine; and at that period unquestionably there were much more elaborate discussions and longer statements on the bench than have usually occurred of late, and therefore the sittings were more protracted, but the separation of the court into two divisions has unquestionably diminished the extent of business to each division, as compared with what it was under the old system, and the sittings have been correspondingly diminished; the sittings are now not generally long; the sittings are on the average, I should say, under two hours; formerly they used to extend, I should think, to three hours or three hours and a half.

195. But does it consist with your knowledge that there have been obviously longer sittings since 1825 than before that period and after 1808?—It is not consistent with my present recollection that the change has been very great; prior to 1825 all the important cases were argued in written pleadings; those were studied by the judges before they came into court, and little more was done by counsel than to make a few incidental observations, which seldom were protracted to any great



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great extent, and the time therefore was rather diminished than otherwise in the discussion of each particular cause; and any greater protraction of time in any particular cause must have arisen from the anxiety of the judges to give their opinions at greater length than from any discussions at the bar.

196. If the Act of 1825 were carried out to the full extent, and parole argument adopted in place of written pleadings, would not it lead necessarily to longer sitting in public of the judges?—Much longer; if the judges could be dispensed with the study of the cases at home, which they understand to be a very labourious part of their duty—if the whole of their information were to be derived from discussions at the bar, the sittings must be protracted to a very great extent.

197. In your experience, do you perceive that a lawyer, who has been more recently appointed to sit as judge in your division is more in the habit of attending to the parole pleading than of studying the case at home?—I think that the judges as they now come from the bar to the bench come much more aware of what are the feelings of their brethren, and what were their own feelings in their previous condition of barristers, and I think they are inclined to indulge those who remain behind them at the bar in more ample oral discussions than perhaps those seniors who have been much longer there, and are not perhaps aware of the extent of that feeling I have been alluding to, and therefore do not feel the necessity or propriety of indulging it.

198. In your opinion, taking into consideration the business which is before the second division, of which you are clerk, would it be expedient to reduce the number of judges of which that division now consists?—I should say certainly not.

199. Will you state to the Committee any reason why you entertain that opinion?—We have had the experiment recently, partly from accident and partly from other causes, of the diminution of the number of judges in that division, and I must say that I think it is to the disadvantage of the court when they have been sitting three instead of the regular number of four judges; and I think I may say, that I am satisfied that it is the feeling of the court itself that they sit with less effect and less judicial weight than otherwise they would have, and I know in particular (though it is not very important to state it) that some difficult and nice cases have been postponed within the last two months in consequence of that circumstance in the present state of the court.

200. But with reference to the quantity of business to be transacted before the court, is it your opinion that three could do that business, merely with respect to the business, as well as four?—I do not see how a diminution in number can either increase or diminish the amount of business they each will have to discharge.

201. Do you consider four to be a more advisable number for the court to consist of than three?—We have had the experience of various numbers. We had originally 15, then we had six and seven, then we had five and five, and now we have four and four, and I think there is but one opinion as to the expediency of the present number.

202. *Sir R. H. Inglis.*] Do you mean the expediency of the present number as compared with a reduction or with an increase?—With both.

203. *Mr. Horsman.*] Do you think that four is better than three or five?—Yes. At one time I thought that five was a more rational number than four; but though we have the largest possible majority when there is a division at all, yet the circumstance of an equal division occurring is certainly the cause of delay and inconvenience; at the same time it has not happened so often as might have been anticipated.

204. *Chairman.*] With respect to the constitution of the inner house, is it your opinion that the business could be transacted there by one division as well as by two?—I should think that measure would lead to a very rapid accumulation of arrears; I do not believe that the diminution of the business upon the whole is such as to warrant any hope that any single division would be able to avoid the recurrence of a very large arrear; every now and then the evil was felt prodigiously before the separation of the court into divisions; since that time the evil has been comparatively small; there is a small arrear at all times, but it is comparatively very small; and at present I think it may be said to be almost annihilated; causes remain undecided that have been brought nearly to the point of maturity in the inner house, but almost always, from some additional paper being proposed by counsel or required by the court, by which a delay is unavoidably occasioned.

205. What is your opinion with respect to the lords ordinary; do you consider that the present number of lords ordinary might be safely reduced, and the business of

of the outer court at the same time properly discharged?—The state of the outer houses seems to be this; I can speak only from report, not being at the bar, or cognizant of their proceedings; I can only speak from what I have observed incidentally; there are five lords ordinary; it is in the option of the parties to go before what lord ordinary they please, and afterwards to go to which division of the court they please, in reviewing the judgments of the Lord Ordinary; from caprice, or from circumstances which it is not easy to explain, there are always favorite lords ordinary; and at present there are two or three who may be said to have the whole business; the consequence of that run upon a particular judge is a rapid accumulation of work, and, of consequence, an enormous delay; if the business were equally distributed among them, those arrears I think would be brought down very low; I do not say they would be brought down entirely, but I am quite sure an equal distribution of the business would afford full occupation to all the lords ordinary.

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206. Then even if the business was equally distributed, you do not consider you could dispense with any one of the lords ordinary?—I do not think we could, looking to the known arrears in the courts of three of the lords ordinary; it is quite evident that there would be full occupation for the other two to bring up those arrears in a reasonable time; it is one of the caprices of the whole business, that it is not very easy to explain how the preferences arise; for certainly, in the case of some of the most distinguished men that have been upon the bench, there has been an almost complete desertion of their bar, not from want of talent, or want of diligence, or want of any of the essential qualities of a judge; but from this capricious practice of the lower class of practitioners, who can go before one or the other, the result is what I state.

207. Do you think it would be expedient that steps should be taken to prevent the public having the choice of their own judge in the outer house?—It certainly would be a very unpopular measure to do that; at the same time, I do not see how the thing can go on, producing as it does a great accumulation of arrears and retardation of justice, without some expedient for equalizing the business. What that ought to be I am sure I have not prepared myself to state; but I am afraid without that there is very little hope of there ever being an equal distribution of business.

208. Sir R. H. Inglis.] Would not any process by which the discretion of suitors was limited in the way which you have now suggested, deprive the suitor in Scotland of an advantage which the suitor in England has, of choosing his own court before which his case might be brought?—Unquestionably it would have that effect at once.

209. Sir W. Rae.] From the circumstance of an arrear of causes before particular judges, is not the evil calculated, to a certain degree, to cure itself?—It does cure itself to a certain extent.

210. How?—In consequence of the great retardation of justice in the ultimate decision. Sometimes, for example, if they find that before one or two of the judges in the outer house there is an arrear of business that will take a twelve-month, a party who is desirous of immediate justice will sacrifice any whim or partiality that he may have, and go to the judge from whom he is likely to get a decision in the course of a shorter time; and that is one cure; I believe that any other remedy would be very unpopular.

211. Mr. Wallace.] It has been stated in evidence that the judges in both divisions of the Court of Session show very considerable impatience at times when counsel are addressing them?—I have certainly heard the observation frequently made, that the judges are not so patient as counsel or agents or parties would desire; but sitting in the second division, as I have done for the last ten years, I cannot in conscience say that I have ever observed any thing to be called impatience on the part of the court; they sometimes certainly indicate an acquaintance with the nature of the case, and with all its bearings, which becomes a great impediment to a counsel who has any wish to consume time unnecessarily; in that way I dare say it has been called impatience on the part of the court; at the same time, whenever anything like argument that has not been very plainly indicated and fully understood is offered on the part of counsel, particularly on the part of counsel whose judgment and whose learning may be presumed to be only employed usefully for their clients, I cannot say that I have discovered anything that ought to be called impatience; they certainly labour under the scandal of being impatient, that I am perfectly free to admit; but, sitting as I



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have done under them for so many years, I think I should greatly go beyond my own feelings of the case if I ventured to state that that scandal was well founded. I think that the present system, from its very nature, leads to the supposition of such impatience; that the system by which they are pinned down prevents their having that full discussion which seems to be desired, and perhaps naturally desired, by parties; and therefore I think the remedy must be sought by altering the forms, so as to make such discussion more indispensable than at present.

212. Is the allegation which has been adverted to, of impatience, equally exhibited towards the senior and junior counsel, if exhibited at all, in the second division?—I cannot say that; I think there is no reason for accusing the court of being more impatient with the junior counsel than with the senior; there is certainly a likelihood that a junior counsel will be less confident in urging an argument in the face of what he may perceive to be the impressions of the court upon the case than a more experienced or weighty senior might be, when perhaps his superior learning and power of argument might give him a better chance of influencing the opinions of the court than a junior might have; at the same time there are a great many cases of junior counsel who are more persevering and obstinate in their determination to be heard out than some of those learned and perhaps more judicious barristers who have a better right to be listened to.

213. Then, from the reply which you have now given, provided the counsel stand boldly out for their rights, the judges listen to them?—Standing boldly out for one's rights is not exactly the phrase that I should employ; but I think any counsel who states that he has material views to suggest to the court is quite certain of being listened to; from my experience, I should say without any hesitation, that any counsel, young or old, who stated his conviction that he had views of the case to present that were deserving of the notice of the court, and which had not been brought before them already in the papers, would be listened to.

214. I will read to you a sentence in the First Report of the Law Commission of 1834, at page 30: "It is impossible, we think, to doubt that there has been for some time past a general and increasing dissatisfaction throughout the country, with the mode in which justice is at present administered in the Court of Session. It seems to be generally felt that the advantages which were anticipated from the enactments introduced by the Judicature Act, have not been realised to nearly the extent that was expected; and that there is not merely room, but an absolute necessity, for some material reform." As a very able and experienced professional gentleman practising before these courts formerly, and as clerk of court now, will you convey to the Committee your own feeling as to whether this is a well-founded accusation against the courts or not?—So far as that passage states the existence of discontent, I do not pretend to contradict it; I believe it is perfectly well-founded that there is in the profession and in the country a certain extent of discontent, whether more or less than what is there stated I do not pretend to say; and it would certainly be desirable that methods should be taken to allay that discontent, however little, perhaps, it was founded on very rational grounds. I have no doubt that the increase of discussion at the bar, particularly in the inner house (for I do not know that in the outer house there is at present any complaint of scantiness of discussion), I have no doubt that the increase of parole discussion, and a greater length of time being bestowed in hearing arguments upon the case, would be gratifying to the counsel and the parties; I venture to state what are my own impressions, sitting there for the last ten or twelve years in a state of comparative indifference in the result of each particular case, and it is upon my own impressions taken up in that way, that I venture to state what I have already done as to the present condition of the court.

215. With the experience you have, and adverting to the latter part of the sentence which I have read, namely, "It seems to be generally felt that the advantages which were anticipated by the enactments introduced by the Judicature Act have not been realised to nearly the extent that was expected, and that there is not merely room, but an absolute necessity, for some material reform;" so far as you are enabled to inform the Committee, will you state what reform would be necessary to have this effect in the second division, and which of course would apply to both divisions of the Court of Session?—I have heard one reform, or at least one change suggested, which is, that the judges should not have access

access to the papers till they have heard the oral discussions at the bar ; I do not think that would be a reform or an improvement ; the question then comes to be, how can you bring about a more prolonged discussion in each particular case than at present, consistently with the existing forms by which those causes are prepared and brought before the judges in the divisions. That a larger discussion at the bar would be satisfactory to the country and the parties, I have not the least doubt ; that the result would be very important, in any other respect, I very much question ; but I should certainly unhesitatingly advise, that if it gave increased confidence to the country, and increased satisfaction, it would be ground enough to warrant a reform ; but in what way that could be accomplished at present is more than I can discover.

216. Would prolonging the sittings of the court tend to have that effect?—I presume it would have that effect ; it is the prolonged sitting, and the prolonged discussion, that seems to be the great desideratum ; but how that is to be accomplished, consistently with the present system of written records and pleadings (for in fact they amount to pleadings, though not exactly in that form), I am sure I do not pretend to say ; how instructions could be given to the Supreme Court not to dispose of a cause without hearing it for a certain time, or hearing it in a certain way, is not exactly what I can comprehend.

217. You have used the word “desideratum,” is the Committee to understand that word as being applicable to your own feelings, or the wish expressed by the public and the profession?—Very much to what is wished by the public and the profession ; greatly more than, in my own observation and experience, I should have considered an object of desire.

218. Are not the counsel in Scotland divided into two classes, the senior and junior?—I am not aware of any division, but one counsel is older than another ; the senior counsel may be one of two years’ standing, when the junior is half a year’s standing, or a day’s standing, but there is no separation.

219. Do not all the seven courts sit on the same day, and frequently at the same hour ; and is there not one set of counsel only to serve the whole seven courts?—That is quite true.

220. May not the same counsel be engaged to appear before each of the seven courts on the same day?—I dare say it happens every day.

221. Is not that a monstrous inconvenience to suitors?—It is an inconvenience of their own seeking, and therefore we cannot say it is a subject of much complaint ; every party is desirous of having the most distinguished counsel at the bar ; and I dare say a learned friend of mine in this Committee has often been in the unhappy situation of having retainers to all of those courts the same morning.

222. If it is not inconvenient to parties, is it not a source of delay to particular courts?—Yes, it is an evil unquestionably, but an evil that I do not know a remedy for. It was at one time proposed, when the courts were divided, that there should be a separation of the bar into two parts ; but that was generally esteemed an undesirable and inexpedient measure, and the consequence has been what might easily have been perceived, that three, four or five of the senior counsel most in repute are very often in a situation not to be able to do their duty, and their causes are called on in one division when they are found to be employed in the other division ; that is very often remedied by a little temporary expedient, calling another cause, and saying, the senior council engaged in the other division will be ready to go on with this before the rising of the court ; in the case of outer house employment, that always gives way ; and if a senior counsel, or any counsel, is employed arguing a case in the outer house, he is bound to leave it, and come into the inner house ; but there again the inconvenience to the lords ordinary is very severe, even more than in the inner house.

223. You have stated that another cause may be called ; is there not a certain number of causes set down for the day’s hearing, and that none but those can be called?—Yes.

224. So that if, by the absence of counsel, the court cannot proceed with those specific causes, the court must rise?—Yes.

225. Does that happen occasionally?—It happens very often.

226. Does it frequently happen that the courts rise in consequence of the absence of counsel from the bar?—Yes.

227. Does this apply to the inner houses only, or to the inner and outer houses?—In the outer house there is no such limitation in the number of causes upon the

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roll; there are before every lord ordinary a great many causes that could be heard in a week or a month, and therefore he can go on from one to the other; and the consequence is undoubtedly that counsel not foreseeing the chance of being called upon upon a particular day, may not be prepared, and that may lead to further delay; and unquestionably both in the outer and inner house delay may occur from counsel being called into the inner house, or called from one lord ordinary to another.

228. Is it in the power of the judges to prevent these delays?—Certainly not.

229. If means were taken to have a larger roll of causes, such as would occupy the judges in the inner houses—a roll as large as the judges in the outer houses have—would not that enable them to do more business by the day or the week?—It might sometimes enable them to do so; but the result would not be very satisfactory to the public, I think, because in that case the counsel must be prepared to go on, perhaps without any certainty of the cause being called at all. According to my former experience and practice in the outer house, it was a matter of uncertainty whether a cause would be called to-day or next week; but counsel were always prepared to take the chance of that, and to go on when it was called; and although very often inconvenience arose to counsel from that, yet I do not know that the litigants were very much injured by that uncertainty; in the inner house, I think it would be very difficult to prepare senior counsel to take the chance of arguing cases in that way; I think that the certainty of the case coming on at a particular time, is the only chance you have of their being fully prepared for the discussion.

230. May not the case being postponed on a particular day from the absence of counsel in either the inner house or the outer house, have the effect of postponing the case entirely till after the vacation?—Unquestionably it may, at the same time the courts always show great anxiety towards the close of the session to give every opportunity to the parties of being heard and having the cause decided, and accordingly I may say, as a matter of ordinary course, during the last two or three weeks of a session, causes that have been delayed in that way are put out again for discussion, and of course the sittings are protracted, and every attempt made to bring up the business to the nearest possible point; I am not aware that many causes have been delayed purely on that account.

231. You have stated that the sittings are protracted; is the Committee to understand that the sittings are ever protracted beyond the usual statutory days?—I mean the hours are protracted.

232. The court has no power of sitting beyond the usual statutory days?—No.

233. Was the division of counsel to which you have referred, objected to by the bar or the public?—It was never matter of any regular discussion at all; I speak of what were the feelings of the bar and particularly of the senior counsel, who of course must have been pre-eminently averse to any such arrangement.

234. You have stated that counsel are always expected to be prepared for the outer house business, whilst they are not expected to be so prepared for the inner house business?—I speak of the effect of having a roll of indefinite length, and a roll of a precise number of cases; with a roll of a precise number of cases you are quite certain of counsel being prepared, unless something occurs which indeed is not very rare that some of the counsel say, "The cause which went before this to-day in your Lordship's note occupied the whole of my night in preparation, and I am not prepared to go on with this till to-morrow, and therefore I crave the delay till to-morrow or another day."

235. I understood you to say, that the outer house course of proceeding was different from that in the inner house, inasmuch as there were a great many causes upon the roll of the outer house, perhaps as many as would serve for a month, but in the inner house only as many as would serve for a day, or part of a day, if by absence of counsel or other reason these causes were decided early or otherwise disposed of?—Exactly so.

236. As counsel are always supposed to be prepared for outer house duties, and as it has been stated in evidence before this Committee, that the outer house business is done in a more satisfactory manner than the inner house business, what difficulty would there be in counsel, who so well satisfy parties in the outer house, preparing themselves equally for the inner house business?—I should not venture to say or think, that the greater satisfaction that is felt in the outer house practice arises from that circumstance, but from this, that from the very nature of the proceedings in the outer house there must be a more full discussion at the bar; the

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Lord Ordinary must, before the case was called, have been aware of the contents of the record, but still it has been the practice there, and I fancy is uniformly so, that the cases are opened and discussed as fully as they can be, just as if the judge had not been cognizant at all of the state of the record.

237. The cases in the outer house are chiefly conducted by counsel, and in the inner houses entirely by counsel?—I do not know any distinction in that respect.

238. Are they equally conducted in both houses by counsel?—Yes; counsel and agents.

239. Are the agents supposed to transact more of the business in the outer house than they do in the inner house?—Not that I am aware of; they cannot appear at the bar in the outer house more than in the inner house, unless it is an accidental case, when on a particular point information is required or given; they cannot plead.

240. You have stated, that, with regard to the outer house, there are favourite lords ordinary, which you imagine arises from some caprice which you cannot account for?—I have called it caprice from not being able to account for it. In one instance, I should say a very remarkable one, which I do not think it necessary to name, a judge of the very highest quality in point of talent and learning was rather too strict and severe in conforming to the rigid rules of the statute and the practice of the court, which made it more disagreeable and embarrassing to agents and counsel than perhaps a little more pliant and flexible mode of conducting the same business would have been; and from that circumstance, I have no doubt, that particular judge was very much deserted, from acting according to what he esteemed a necessary duty as judge.

241. Have not, in your long experience, the lords ordinary who have been the best lawyers and the most industrious, been always the greatest favourites with the public?—Certainly not always.

242. You have stated that the best judges and the most industrious men have not been always preferred; is that the exception or the rule?—I think it is the exception, undoubtedly; and I should think the exceptions are not very numerous.

243. You have stated that since the year 1825, which is the date of the Judicature Act, you do not think there has been any material change in the length of time the judges sit in the inner houses, and you have also stated that the extent of written papers submitted to them now is not nearly so great as it was formerly?—With respect to the extent of sittings, I do not think we were in the habit of timing the court quite so much as has been the practice of late; but my impression certainly is, that the sittings were not much more protracted formerly than now: I speak of the period subsequent to the division of the court. Then, with respect to the extent of papers, the observation I have to make is this; unquestionably papers are much less bulky now than they were formerly; formerly they were full and elaborate discussions, both of the facts, the evidence and law of every case; they went to a very great extent often; at present they are much shorter; generally speaking, where there are no written arguments, such as what we call cases, but where it consists merely of a summons and so on, what is technically called the record, the extent of those papers is greatly diminished from what it was; but I do not believe that the labour of the judge is at all diminished in making himself master of the case. I think that the extended argument formerly, with all the cases quoted, and all the views of it suggested at full length, could be gone over with much more celerity, I do not say with more advantage than now, when they have only references to the cases, or a statement of hard points of law, which they themselves must study, where they must resort to either the cases referred to by the parties, or such cases as they may, from their extensive and full knowledge of the law, think it expedient to consult; in that way I have been led to think, and I am persuaded I am not far wrong, that the time occupied now by the judges at home in their studies cannot be less than it was formerly.

244. Have the judges from time to time what are called hearings in presence of the whole court?—Yes.

245. Are those hearings taken after the lords ordinary rise, or at any special hour, or are they taken accidentally at any time which may occur to the judges to order them?—Taken without any reference to sittings in the outer house.

246. When such hearings do take place, does it interrupt the whole of the business of the seven courts you have spoken of?—It does not affect them in the least.

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247. Does it not cause all the judges to leave their bars?—I should state that there are two sets of hearings in presence. The more common case of a hearing *in presentid* (according to the ancient technical phrase), is before a single division of the inner house; but there are some cases sent by remit from the House of Lords to the Court of Session, in which they are required to meet in their entire number and have the cause discussed *in presentid*; and in other causes, of their own proper motion, the two divisions may unite, and may call in the lords ordinary; that, of course is a complete stop to the whole proceeding of the outer house.

248. Are those hearings in presence generally ordered after the hours at which the lords ordinary and the two divisions sit, or are they generally so held as to interrupt the whole business of the court?—They are ordered after the lords ordinary have been two hours or two hours and a half in court, meeting at nine, and the other courts not meeting till eleven. Those hearings of the whole court together have occasionally of late been begun as either of the divisions have met; and in that I think that, in common with the bar, I may say individually, I have felt some inconvenience, hardly meriting the name of a grievance, inasmuch as it interrupts the business of the separate division, which must take place in that case after the meeting of the whole court. That I think is an inconvenience that could be very easily avoided, and I believe will not occur very often again; but unquestionably in the last twelve months it has occurred in three or four different cases, and I think very much to the inconvenience of the bar, and very much to the inconvenience of the profession generally, and it has been complained of.

249. Are any of those among the cases which have been returned to the House of Commons?—I am not aware of that.

250. You were not made cognizant of the return I allude to?—I was not.

251. The two inner houses meet at eleven, do they not?—Yes, that is the fixed hour.

252. Is that hour fixed by statute, or by act of sederunt?—I think by act of sederunt.

253. Can you recollect the purpose of the court being postponed till eleven o'clock?—For the purpose of giving more time to the lords ordinary, that the counsel might not be called away from the lords ordinary.

254. Was it to give time to the lords ordinary or to accommodate the counsel?—I should think it was to accommodate the public, and enable the lords ordinary to go on with their business without interruption for a longer time than before.

255. Can you charge your memory with what is stated by the act of sederunt as the real cause of fixing the hour at eleven?—I cannot at this moment, but I understood it was with a view of expediting and forwarding the business of the outer house.

256. You have stated that though the judges have considerably less in bulk to read, you conceive that they have so much more in substance as to require the whole of their time as formerly?—I am convinced that it is a more laborious business now than formerly; it is a conjectural observation of mine more than any thing else; but I should think that a full written argument, where you have no occasion to turn to a book, unless under very singular circumstances indeed, is much more easily and much sooner done than where you have the mere elements set out before you, and where you are anxious to study the points of law that arise out of it.

257. You have mentioned that generally now there is no arrear of business?—I believe very little; I came unprepared with any statement at all, not knowing the points upon which I should be questioned, but I am perfectly aware that the arrear of the second division is reduced almost to nothing; I had occasion last year to sign a report, if I do not mistake, upon that subject.

258. There has been a discussion as to whether it would not be beneficial to extend the sittings of the court considerably and shorten the vacations; as there is no arrear of business, should I be wrong in stating that were the sittings to be prolonged, the courts would be without any thing to do?—I do not think that would be the necessary consequence, because there are causes coming in progressively, I may say almost daily, from the outer houses, and if the outer houses continued to sit a longer time, and the inner houses also to sit during the same prolonged period, additional cases would come in in the course of that very period of prolonged sitting, and in that way they would never be quite clear of business;

business; I am taking for granted that the lords ordinary are sitting and deciding the cases which might be reclaimed against. *T. Thomson, Esq.*

259. Would not that be a probable if not a certain way of reducing the arrears of the lords ordinary?—Unquestionably it would; the prolonged sitting of the outer house would of course diminish the arrear. *20 March 1840.*

260. The prolonged sitting both of the outer and inner houses would have the effect of reducing the arrears of the lords ordinary?—It would have the effect of reducing the general arrear of business of any kind, taken as a whole, but not the particular arrear of the outer house, as far as I understand.

261. It has been given in evidence here, that cases are supposed to be more important than they used to be; are you of opinion that the Court of Session is more importantly employed than in your own time; that is, in more important cases?—I cannot say that I am aware of that.

262. Has not, in all your experience, all the important business of Scotland come before the Court of Session?—I think it has.

263. And does so at this moment?—I think so.

264. Then you are not aware of any greater importance being fairly to be attached to the general business flowing into the Court of Session now than at former periods?—I think the number of cases of a certain class, which may be called mercantile cases and commercial cases, have very considerably increased in the course of my experience at the bar and in the court; I think the number of cases of a different class and very important, have diminished; I mean questions of a feudal nature.

265. But upon the whole am I to understand, that you are not prepared to say that more important business is now brought into court than formerly?—No, I do not suppose it.

266. Is not a very large class of the business entirely lost to the Court of Session now, since the Reform Act, namely, that belonging to the qualification of voters?—Certainly.

267. Was not that a matter of litigation to a great extent in that court?—Yes, and difficult litigation, but it came somewhat periodically.

268. That source of business has entirely ceased in the Court of Session?—I should say, entirely, as far as regards the qualification of voters; the feudal right to land being now no longer the Parliamentary qualification; those were certainly very important cases, some of them were very easy cases to decide, others very difficult.

269. And they occupied a large portion of the time of the court?—They certainly did.

270. Has any business of a similar nature accrued since the Reform Act?—I should say comparatively little; I think from boroughs there have been some questions under the Act reforming the constitution of boroughs; formerly, however, there were questions of the same kind, and therefore I do not suppose that there has been any increase in that class of business at all.

271. Would it be fair to conclude that, this description of causes now having ceased altogether, the diminution upon the general number of causes coming before the court may be attributed to the above cause?—Scarcely; I do not think the number of those questions of Parliamentary qualification ever was so great as to form any very large proportion of the general business of the court; they very often were questions of great nicety in feudal law, and occupied a great deal of time in discussion, but the number of them of any difficulty and nicety was not so great as to make any great figure in the mass of business.

272. Are you aware that there is a considerable diminution in the number of causes brought into court generally?—I am not able to state that, not being prepared with any regular memoranda upon the subject, and being able to speak only from general impression and general information; I should be inclined to think that at present, that is to say within the last year or two, there has been somewhat less business in the Court of Session than formerly; I do not know that the circumstance can be traced satisfactorily to any one cause.

273. Seeing that the above very important class of business is lost altogether, and that there is a diminution of business generally, are you still of opinion that no fewer judges than the present number of 13 could do the business of the country?—I am sure it would very ill become me to say I could give a positive answer to that question; I would not say that four lords ordinary would not be able to overtake

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the business of the country; I am persuaded that one inner house division could not overtake the whole business of the country, but I do not think there are at present any elements for forming the opinion that there is a permanent diminution in the business of the Court of Session; there are accidental fluctuations in the business of that court, and there have been always such within the period of my experience.

274. Will you have the goodness to refer to returns which have been made from your own court within these last 10 or 15 years, so as to be able to speak to this point upon a future day?—I will.

275. *Sir W. Rae.*] You have said that one reason for the diminution of business in the inner house has been greater confidence being entertained of the judges of the outer house?—Yes, and that I should call a temporary circumstance.

276. Supposing the number of reclaiming notes from the lords ordinary in the last five years was in 1835, 362; in 1836, 334; in 1837, 456; in 1838, 356; in 1839, 327; do those numbers bear out the inference that you have drawn, supposing them to be correct?—I think, on the contrary, they seem to contradict it; but in truth the impression I wished to convey was, not as to the absolute number, but as to the proportion of cases that are brought under review; and which, according to the best information I have upon the subject, is less in proportion to the total number of judgments in the outer house than it has sometimes been; in former cases, decided by a particular lord ordinary, supposing he decides a hundred cases within some limited period, I think the proportion of reclaiming notes to the final judgments has been rather less than I have known it, according to the best information I have; but I think the statement of figures which you have given, and which of course I was not cognizant of, having come here not being possessed of those returns, seems to negative very plainly the fact that I wanted to state generally, that there was a smaller number of cases brought into the inner house than formerly; but, however, I spoke more of the last two years than of any other period.

277. *Dr. Lushington.*] You stated, in the early part of your evidence, that when new matter came out, it was customary that cases should be ordered?—That is one of the occasions in which cases are ordered.

278. What do you mean by the expression, "new matter"?—Matter in argument.

279. Law and not fact?—Yes.

280. When a case comes to be argued in the inner house, there can be no new facts introduced?—No, except in some extraordinary cases, where additions to the record have been admitted.

281. You have been asked many questions as to the difference of time occupied by the judges in discharging their duty, in consequence of long written cases being abolished; will it not very frequently happen that when there is a simple record, consisting of the summons, the defences, the condescendence and answers, and no written argument at all, it must be the duty of the judges, either prior to the oral argument, or subsequently, to examine just as difficult a point of law as any which formerly could be debated in a written case?—Precisely the same, only they have the labour of ferreting out the cases and preparing their minds upon the subject.

282. Ought that laborious preparation to be prior to the oral argument or subsequent to it?—At present in the course of proceeding it appears to be generally prior to the oral argument, for the court are plainly quite masters of the case as far as it appears upon the record, and fully cognizant of all the decisions that bear upon it when the oral argument takes place.

283. Would it not be infinitely preferable if they made themselves masters of the facts and of points of law arising upon the face of the record, but reserved their consideration of the questions of law until after oral argument?—I presume that it is their duty to keep their minds quite open for the argument at the bar; nor am I aware that any of them would avow either the duty or propriety of their forming a decided opinion before coming there.

284. Would it not give greater satisfaction to the people of Scotland, if, having the record, and of course seeing the points which would arise, but not going into a nice examination of the cases bearing upon them and the authorities which might be cited, they came into court and heard the full argument orally, and then afterwards took what time was necessary to make up their minds upon the question?—I have very little doubt that that would prove more satisfactory; at the same time,  
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how that is to be accomplished under the present system is exactly what I express my doubts about. T. Thomson, Esq.

285. Supposing the business be despatched in the manner I have now suggested, do you think it would be any saving of time upon the whole to the judges?—Not a bit. 20 March 1840.

286. Sir *W. Rae*.] The record comprehends, besides the state of facts, the pleas of law?—Yes.

287. Does not it refer to the decisions?—In important cases some counsel are in the habit of referring to decisions, others not; but you cannot suppose that any judge in the Court of Session is not perfectly aware of the sort of cases and the names of the cases that bear upon a particular point.

288. A judge reading the state of facts, and looking to those decisions and cases, is it possible that he can fail to form an opinion upon the case?—I have not the least doubt that he does.

289. But of course every judge is open to have his opinion shaken by debate at the bar?—Yes; it is to be presumed.

290. Do you consider that, as regards the administration of justice, it can be prejudicial that the judge should be informed of the case before it is debated?—If a judge is to be allowed to know every fact of the case before coming into court, and the nature of the pleas of law, it is incomprehensible to me how he can avoid coming to some sort of *prima facie* conclusion.

291. The *Lord Advocate*.] You said that the judges, according to your apprehension, not merely read the record to make themselves masters of the facts and consider the pleas of law, but that they must often at home have studied the case completely, and have referred to the decisions likely to bear upon it?—That is quite evident.

292. Is it an advisable course of judicial proceeding that a judge should study the arguments of the case, ferreting those arguments out himself, and making himself master of the case by turning his attention to all the decisions that bear upon it, without first hearing counsel?—I do not think it is.

293. But that is a mode, is it not, which under the present system is much practised in the Court of Session?—It is a mode unavoidably practised in the Court of Session.

294. You say unavoidably; why unavoidably?—If you submit those records as now constructed to the perusal of judges before coming into court, and they are put into their hands for the purpose of being perused and studied, I do not see how you can put a prohibition upon the judge from making himself as much acquainted with the cause as possible.

295. I do not propose to put a prohibition upon the judge; but those records are put precisely in the same state, are they not, before the Lord Ordinary?—Yes.

296. Is there any reason why the judges of the inner house, instead of studying those records at home to the extent to which you state that they do, should, before they studied them so fully, hear the arguments of counsel; is that unavoidable?—It is not unavoidable if you prevent them from being in possession of the record.

297. Is it, because they are in possession of the record, necessary that they should ferret out arguments before they hear them stated, that they should turn up their own books till such time as they receive a little light from counsel bearing upon the case?—Necessity there can be none; it is a matter, of course, of choice in the judge, what he does in that respect; but it certainly is the understanding, I conceive, that it is the duty of the judge to make himself acquainted with the record before the cause comes to be heard.

298. You say, comparing the period before 1825 and after 1825, there is no visible difference, so far as you have observed, in the extent of the time which is occupied by the judges in court?—I cannot pretend to speak to any marked difference upon the subject; nothing that impresses itself upon my mind as worth remembering.

299. In the latter period, since 1825, a great number of cases have been submitted to the court without any argument at all, although with the points to which the argument is to be addressed indicated?—That is the result of the Judicature Act, certainly.

300. Then a great many cases are decided in court, being studied at home by the judges



*T. Thomson, Esq.* judges, without the benefit of argument from the bar, except such as may be offered after that study?—Certainly.

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301. Would it not be preferable, and would it not be a better course of proceeding, that in those cases the judges should postpone that study which at one time or other must be given till they have heard the arguments *voir dire*, which is the only way they can be heard?—I should think it preferable, and certainly much more satisfactory to the parties; how the discretion of judges is to be controlled in that matter is another thing.

302. Do you think that the discretion of the judges in the matter is wisely exercised in that exhausting study at home, in which you have described them as referring to authorities not mentioned by the parties, and as ferreting out arguments not suggested by the parties, before the arguments of counsel are addressed to them, or would that not be better deferred till after those arguments of counsel?—I feel very much at a loss to answer that question with any precision; I think there are disadvantages attending the present system unquestionably; but they seem to me to refer more to the feelings at the bar and behind the bar than to the success of the court in doing justice in the particular cases that come before it; I am perfectly satisfied that the feelings of the country, and consequently the confidence of the country, would be increased by a larger proportion of the work of the judges being done in public; in other words, what you propose, that they should hear the cause argued at full length, without making themselves previously so well acquainted with the bearings of the case; I do not think that their intimate acquaintance with the cause before it comes to be heard is, strictly speaking, any bar to the most ample discussion at the bar, not the least; but the result that actually exists is the natural consequence of that previous intimate acquaintance which they betray with the nature and bearings of the case. It is, of course, a matter of discretion in counsel to go more or less into the case, but I fancy counsel of ordinary tact will feel themselves a little controlled in that by the plain consciousness and perception that the court are already masters of the cases to which he has to refer; at the same time I must say, that in all cases where counsel have appeared anxious for full argument, I have not observed any sort of aversion in the court to indulge them to their fullest extent. In the greater number of cases there is very little law and not much of fact, and in such cases what is called impatience will be betrayed by the judges, when on the part of the counsel at the bar, counsel not very eminent in practice or discretion, an attempt is made to protract the discussion unnecessarily.

303. In point of fact, then, by this substitution of study at home upon the record, which presents no argument, a great number of cases are decided with little or no argument at the bar?—The system of preparation to which you now allude, certainly makes it unnecessary in many cases for counsel to open the case with a very full and elaborate statement of the facts; that is superseded unquestionably by the perusal of the papers; in the matter of argument, I think the court are even at present quite open to argument—open to patient hearing; but the consequence of that former proceeding is certainly to abridge very much the length of discussion, and that itself seems to be the great evil at present complained of.

304. Do not you think that a party has a reasonable right to expect (I speak more of the suitor than the professional party) that, by the statement of his counsel, he, the suitor, should be satisfied that the arguments applicable to his case have been stated to the judge?—I think it of the greatest advantage that he should be so.

305. Can then the suitor be satisfied when there has been no discussion, or next to none, at the bar, and when the arguments which he thinks should be addressed to his case, and which his counsel thinks should be addressed to his case, have not been under the consideration of the court?—The primary purpose of a court of law is to decide a cause well; a secondary object is to decide it in a manner that will prove to the satisfaction even of the losing party. I do not think that the present system is at all unfavourable to the first of those purposes; to the second, we all confess that it is so a little; if the first could be accomplished in combination with the second, it certainly would be a desirable improvement; but I do not think it is in consequence of any voluntary actings on the part of the judges that that satisfaction is not at present given; I mean to speak only of that court, the second division, with which I am myself acquainted.

306. Is it not impossible that the system can be administered satisfactorily to the suitor unless the suitor is satisfied that the court have considered what he has to offer either for his action or in his defence?—Certainly.

307. Unless those arguments be in one shape or other addressed to the judge in court,

court, and more or less shortly, is it possible to satisfy a suitor that they have been considered by the judge who decides his cause; is it not a great defect of the present system as it is now practised, that there is so little statement in argument at the bar?—I think the present state of public opinion as manifested in so many different ways is a complete proof of that.

308. Is there anything in the present system of record which in itself necessarily prevents argument at the bar?—Certainly not necessarily.

309. The judge's knowledge of the case may lead him to abridge the argument, and to interfere more strongly and more frequently than if he had to receive full instructions in the case, having no previous knowledge of it; but is there anything in the circumstances which should prevent argument at the bar?—Certainly not.

310. Yet, in point of fact, there has been so little parole argument at the bar, though the system has been changed, that in every body's opinion the sittings of the court have not been considerably protracted, and you ascribe that to the study of the judges at home?—It strikes me that the question rather understates the extent of argument as now practised at the bar. The study of the records at home probably has the effect of superseding an explanation of a great many minor details, and a great many points that might be indispensable to the full understanding of the case; but in general, most causes turn upon some one or two nice points, if they have any point at all, and to those the attention of the counsel is, under the present system, always directly applied; upon those the discussions are carried on, as fully, perhaps, as they could well be though they were combined and blended with a more ample discussion and statement of the facts, as is practised, as I understand, in the outer house.

311. Where the judge has a full knowledge of the case in the way you describe, of course the senior counsel, or an experienced counsel, understands that he must address himself to that part where the point of the case lies?—Yes.

312. But in coming to that understanding with the court, the suitors would be left in the dark as to what is rightly left out or not?—Yes.

313. Do you understand that, in deciding cases, the judges in the inner house of the second division are sufficiently at pains to explain the grounds upon which their judgments rest; are there not many cases decided without that full explanation of the ground upon which the judgment rests which would be satisfactory to the profession and the suitors?—I think in some cases it would be highly desirable that more ample statements should be made from the bench than at present. In that respect there is a great inequality in different cases; in some the judgments are as fully given as could be desired by the parties litigant or the profession, with a view to form legal precedents; in others, either from a feeling that the case is not a very difficult one, or that it is a case that has been considered so fully, and determined by former precedents, as not to require much explanation, the public and the profession have sometimes been left a little in the dark as to the precise points upon which the case was ultimately decided. That, I think, is to be regretted; but it is an evil, I think, that is rather in course of being cured than otherwise, by the voluntary conduct of the judges in the court.

314. You are aware that the evil is to a certain extent existing?—Yes; and we have been made fully aware of it by cases coming back from the House of Lords to the Court of Session, very much in consequence of the want of full explanation of the grounds of the decision of the court.

315. Of course such a statement of the grounds upon which judgment is pronounced should be made in open court?—Of course, otherwise it would be very useless in the view we are now taking of the matter.

316. In putting this question, it is the farthest thing in the world from my intention to intimate any doubt about the judges studying their cases at home; but when cases are decided upon this home study, in which the judge is left to look up his own authorities, and also to suggest arguments, which is a much more difficult thing at best to any judge, can there be any security to the suitor or profession that all the judges of the court, consisting of four, have made that study personally, and looked up those authorities, and that they are not leaning upon the opinion of one of their brethren?—There can be no such security.

317. Is it not one immense advantage never to be lost sight of, that, in *viâ voce* argument, the suitor and profession are assured that every judge who has ears to hear, and eyes to see, has heard the argument and read the authorities to which reference is made?—I have not the least hesitation in assenting to that.

318. Is it not a great defect in the judges' exercise of their discretion with

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respect to that minute study which they give to the cases at home, that before the cases are called on, and the parties are asked at the bar to address themselves to arguments, they (the judges) have made that minute study which, in the opinion of the counsel as well as the judges, might supersede a great deal of the argument?—In reference to the feelings of parties (I do not say so much to the feelings of counsel), I have no doubt that the more ample the discussion is in each particular case, they are always the more gratified, and will feel a greater assurance in the result.

319. With respect to the experience and skill of counsel, is it not as much shown in this, as in any thing, that counsel of experience, and of a certain age, catch more easily the particular point upon which the court are willing to hear him than the junior counsel, who may create a disinclination to hear him, because he raises arguments which the court, from their previous study, may think more inapplicable than they would have thought if they had not previously read the arguments?—I am afraid that will be the case with any system.

320. Does it not prevail in the Court of Session, in consequence of their reading the arguments, and referring to the case previously?—That is one of the necessary results of greater skill and greater experience.

321. *Sir W. Rae.*] In your division, is it not the practice for each judge to deliver an opinion?—I think that generally it is; not, perhaps, to such great length as would appear to be desirable; sometimes, when one judge delivers an opinion at great length, another judge will say, “You have completely anticipated the grounds of my opinion, which I therefore decline to state.”

322. Has it occurred to you frequently, or ever, to consider that any of the judges did not understand the case that was brought before them?—I have said already, I believe, and I am very happy to be able to repeat, that as far as my experience and observation go, the judges have been most conscientious and faithful in making themselves acquainted with the cases.

323. Supposing those to be evils which are put to you, does it occur to you that any remedy, or what remedy, could be applied?—I have already said that, except locking up the record, I do not see what else is to be done.

324. Am I to understand that those evils are in progress of remedy in the course of practice?—I think they are; I think it is the tendency of younger judges coming upon the bench to encourage more and more a larger discussion at the bar; and I have not the least doubt that if the system be let alone, and not tinkered and tampered with as it has been for the last 30 years, it would purify itself gradually, and become much more satisfactory to the public, more especially if some of the rigidity of existing statutes were somewhat allayed and diminished by greater discretionary power in the court to reform the minute parts of its proceedings.

325. *Dr. Lushington.*] Will you be so good as to state in what respect the court has been tinkered and tampered with during the last 30 years?—We have had at least 10 or 12 Acts of Parliament.

326. Do not you conceive that the greater part of the regulations applied by those Acts of Parliament have been beneficial to the administration of the law of Scotland?—I am not prepared to give an unqualified answer to that; many of them are improvements I am free to admit, and particularly in the diminution of expense of legal proceedings in Scotland; I have no doubt that the suppression of some of the jurisdictions, and the combination of them in the Court of Session, have operated advantageously in the long run both as a diminution of the public expense, and as merging what I would call the inferior jurisdictions into that higher and probably more weighty jurisdiction to which they are attached; but in the minute details of judicial procedure there have been many changes in the proceeding from 1808 downwards, some of which I think are very questionable; indeed, by those, the powers of the court have been very much fettered, and that progressive improvement which might have gone on silently and quietly, as I believe it does in most of our jurisdictions elsewhere, has been considerably impeded.

327. Upon the whole, are you not of opinion that the alterations since 1808 have been beneficial to the administration of the law in Scotland?—In the mass, I should say they were.

328. *The Lord Advocate.*] Do not you think the Judicature Act tied up the form of proceeding too tightly in not leaving the power to the court by acts of sederunt to form rules from their own experience and knowledge of the practical conduct of cases?—I am very much convinced that that is the case, both in the conduct of  
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the proper business of the Court of Session and in what has been called the business of the Jury Court; I conceive, in both departments, there is a rigidity in the Act of Parliament which is to be regretted, and which has injuriously diminished the discretion of the court.

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329. *Dr. Stock.*] You have stated, that by means of Acts of Parliament, there has been a good deal of tampering and tinkering with the court; do you suppose that, without Acts of Parliament, the old system of Scotch law could have worked that cure?—The organic changes in the court which have taken place could not have been accomplished but by statute, and therefore you must not suppose I allude to them.

330. But I mean particularly to allude to the alteration that has been effected from the system of written argument to oral pleading; could that change have been effected by act of sederunt or any other orders of the judges?—I think, as the court understood their powers in former times, they might have gone very far to introduce the system of oral pleading, and supersede the use of those long written arguments.

331. Do you think the change would have been accomplished without an Act of Parliament?—It was certainly running on worse and worse in the direction of lengthened written pleading; and in the last 20 years, the extent of written pleading in the Court of Session was much more monstrous than at any former period; there is no doubt about that; and if the judges had the power of checking that, there was certainly no check applied.

332. Is it the duty of the Lord Ordinary to ascertain the facts of the case by the interposition of a jury?—Only a certain class of cases in general; there are certain causes which the statute peremptorily requires should be sent to a jury, although perhaps, taking the proof upon commission, or the proof by witnesses taken in court, might avoid a great expense, and be of great advantage; and that is one of the rigidities to which I have alluded.

333. Has it frequently occurred, in your experience, that cases of any considerable importance have been decided by *viva voce* evidence of witnesses, where no jury has been empanelled?—Of late not at all, except in consistorial cases and a few others.

334. It is within the power of a Lord Ordinary to summon a witness before him?—In certain cases he cannot: in what are called the enumerated cases, he must send them to the jury court; but there are other cases not enumerated, and particularly all consistorial cases, where it is almost invariably the practice to take evidence in court or on commission.

335. Is the practice of deciding causes on written depositions very extensive; does it embrace a large proportion of the cases that come into court?—There is no other practice, I believe, of examining witnesses without the intervention of a jury, but by a commission; it is rare, indeed, that a witness is called into court; sometimes it does happen in cases of misdemeanor, or some cases where the dignity of the court has been insulted.

336. In all other cases the practice of ascertaining the facts is by written depositions or upon commission?—Yes.

337. Is that a large proportion of the cases?—Very small.

338. *Mr. Wallace.*] You have referred to the jury trial in Scotland; is that popular with the public?—I am told not.

339. *Chairman.*] You do not speak of your own knowledge?—No, I have no knowledge upon that.

340. *Mr. Wallace.*] Can you state to the Committee whether the expense of conducting a cause by jury trial, as it is called in Scotland, is greater than the expense of conducting causes before the Court of Session without a jury?—The only source of my information upon that subject is derived from the accounts of expenses given into court against a party, for the purpose of being allowed and sanctioned by the court, and those in jury cases certainly are heavier than in ordinary cases.

341. *Sir W. Rae.*] Have you compared those with the cases of proof on commission?—I am not prepared to state any thing precise on the subject. In the case of Mercer, a case relating to legitimacy, which was heard last session in the court, I am convinced that the expense must have been much more than it could have been by any trial by jury.

342. *Mr. Pigot.*] You said that before the lords ordinary there was usually a more full hearing than in the inner house?—That I understand; but not from any knowledge of my own.

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343. Do the lords ordinary deliberate and decide upon the same documents that go before the inner house?—Precisely; there can be no addition made to the documents that are the subject of deliberation in the outer house.

344. Has the Lord Ordinary an opportunity of seeing those documents before the cause is heard?—Necessarily, because it is his duty to superintend the formation of what is called the record; he is in fact cognizant of its gradual preparation.

345. Can you assign any reason, if the same documents form matter for his consideration as form matter for the consideration of the inner house, and he has an opportunity of looking at those documents, why there is a fuller hearing in the outer than in the inner house?—I cannot indeed; there is no good reason for it but this, that a considerable time most frequently elapses after the preparation of the record before the cause comes on for hearing.

346. *Sir W. Rae.*] But is there not one document in addition which goes before the inner house, which the Lord Ordinary of course has not the advantage of, namely, the note of the grounds of his own opinion?—It has become the almost invariable practice now for the Lord Ordinary to give a very full statement of the grounds of his decision, which certainly is a great convenience to the court; at the same time I have this inclination of opinion myself, that it more frequently leads to a little challenge on the part of the court of the justice of the grounds than an acquiescence; they are not quite so much delighted with being instructed by the Lord Ordinary.

347. *Mr. Pigot.*] But, in point of fact, that is the only difference between the documents upon which the Lord Ordinary acts and those upon which the inner house decides?—Yes, that is the only difference; cases may be ordered afterwards, but the person who reclaims against the judgment of the outer house can produce nothing that has not been previously before the Lord Ordinary; the court itself may order additional documents to be produced, and it may order additional arguments in writing.

348. *Sir W. Rae.*] What is the proportion of causes in which cases are ordered?—A very small proportion.

349. Can you name the proportion?—I cannot; I should say not one case in ten.

350. Where cases have been either prepared by the Lord Ordinary or ordered by the court, the meaning of that is that the judges should read those cases?—It is.

351. Having read them, how can the judges avoid forming any opinion upon them before coming into court?—I really cannot say.

*Mercurii, 25<sup>o</sup> die Martii, 1840.*

MEMBERS PRESENT:

The Lord Advocate.  
Sir William Rae.  
Dr. Lushington.  
Mr. Wallace.  
Mr. Ewart.

Sir Charles Grey.  
Sir Robert Harry Inglis.  
Dr. Stock.  
Mr. Horsman.  
Sir Thomas Dyke Acland.

THE HON. FOX MAULE IN THE CHAIR.

*Mr. William Alexander* called in; and Examined.

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352. *Chairman.*] I BELIEVE you are a writer to the signet?—I am.

353. How long have you been in practice before the supreme courts?—Since 1819.

354. Have you been in constant attendance upon the courts since that period?—I have.

355. You are acquainted with the mode of conducting the business in the Court of Session previous to the year 1825?—I am.

356. Can

356. Can you state generally to the Committee the mode in which the judges of the inner division, previous to the year 1825, dealt with cases when they were brought before them?—I can, if it is the wish of the Committee.

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357. Proceed with that statement?—The judgment of the Lord Ordinary was brought under the review of the inner houses of the court by means of a petition from the party dissatisfied with the Lord Ordinary's judgment; that petition narrated fully the whole facts of the case, all the arguments that the petitioner thought fit to adduce, and full reference to authorities and to precedents; that petition was followed by an equally full answer on the part of the person in whose favour the judgment was given, and the petition and answers were advised by the court, after hearing counsel at the bar make any additional statement that they might think necessary.

358. That was the practice previous to the year 1825.—Yes.

359. Was the result of that practice this, namely, that the judges studied the cases so submitted to them out of court, and consequently devoted a shorter period of time in court when they came to give their judgment?—It was.

360. Was that mode of dealing with the cases satisfactory to the bar and to the public?—It was not; but I conceive it was more satisfactory than the present mode.

361. Why was it more satisfactory than the present mode?—Because the judges were made more fully aware both of the facts and the law of the case than they now are.

362. When the change was made in 1825, did the bar and the public anticipate that the judges would give a more prolonged hearing to the counsel, in consequence of the curtailed state of the written documents that were placed before them?—I can only answer for that branch of the profession to which I myself belong, and I have no hesitation in stating that we did expect that if the papers put before the inner-house judges were more brief, the oral hearings should be more lengthened than formerly.

363. Have the papers put before the inner-house judges since 1825 been more brief?—A great deal.

364. Have the oral hearings been more prolonged?—I do not think so.

365. Is it your opinion that the oral hearings are, up to the present period, sufficiently long to be satisfactory to the parties litigant before the supreme court?—Certainly not.

366. Do you attribute this to any defect of the Act of 1825, or to the fact that the judges who were accustomed formerly to study written papers, have not yet brought themselves to the practice of deciding upon oral pleadings?—I attribute it partly to both, inasmuch as I think, had the Legislature anticipated that the hearings of counsel would not be made more full, some provision that would have secured that object would have been introduced into the statute.

367. Supposing the spirit of the Act of 1825 to be fully carried out in the inner house, is it your opinion that sufficient work would be found for two divisions as they exist at present in the inner house of the Court of Session?—I have no doubt whatever that ample work would be found for both divisions of the court.

368. Then, keeping the arrangement of the two divisions in view, is it your opinion that the numbers that constitute those divisions at present could with expediency or benefit to the public be altered?—I do not think that the public would object to the number being increased from four to five, but I think the public would be very much dissatisfied were the numbers reduced from four to three or to any lesser number.

369. Then, in your opinion, the public would not be satisfied, that is, the public would not be sufficiently well served, by a fewer number of judges in either of the first or second division?—Certainly not.

370. Having now stated your opinions with regard to the inner house, is it your opinion that the number of lords ordinary could be reduced with satisfaction to the litigants before them?—Looking at the quantity of arrear of business in the outer house, especially before three of the judges, and the great quantity of labour that the junior judge, who presides in the Bill Chamber, has to perform, I think that the public service requires that the number of the lords ordinary ought to be increased rather than diminished.

371. Do you consider that the option that the litigant has of selecting the ordinary before whom he chooses to bring his case is an arrangement by which

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the general discharge of the public business is or is not facilitated?—I think if the pursuer were to be allowed the option of the lord ordinary alone, that it would be a fair thing; but that taking it conjoined with giving him also the option of selecting the division of the court before which his case is to come, is, I conceive, to give a pursuer a very great advantage over the defender in the case that ought not to be possessed.

372. With reference to the general division of labour amongst all the judges, and the more speedy clearing the roll of cases, is it your opinion that the option of the pursuer to choose his judge might be done away with, and that each case should be taken from the roll in rotation?—I do not think that the option ought to be taken away, or could be taken away with advantage; that even when no such option existed, we were always able, by executing the summons at a particular time and delaying the calling of the summons, to secure the outer-house judge that we might prefer; what was done by a little management and forethought formerly may now be done openly.

373. Then, in that case, even suppose that the option of public choice was done away with, by a little management and forethought, every party almost could succeed in bringing his case before the judge he wished?—He could, with the exception of the Bill Chamber judge.

374. Are you of opinion, that the business of the inner house could be performed by one division?—That depends upon the mode in which the business is performed by the judges; if it were performed in the manner which, I humbly think, was contemplated when the Judicature Act was passed, I do not think that one division could overtake the business.

375. Mr. *Wallace.*] Have you made any publications relative to the Court of Session or the law of Scotland?—I have.

376. What are those?—In 1837, I published an Abridgment of the Acts of Sederunt of the Court, from its Institution in 1532 down to that time; and last year I published a Digest of the Bankrupt Act for Scotland, which was passed last Session of Parliament.

377. Was the abridgment you published of the Acts of Sederunt done with the approbation of the court?—It was.

378. Sir *W. Rae.*] Do you mean by their sanction?—I will explain; I applied to the court to know whether they had any objection, or if it would be agreeable to them that such an abridgment should be published by me, and their cordial approbation was expressed from the chair.

379. *Chairman.*] In open court?—In open court.

380. Mr. *Wallace.*] Was the Digest of the Acts of Sederunt shown to the court before they were published by you?—A few sheets were, in order to show the plan of the work, but not the whole work.

381. Does it consist with your knowledge, that the House of Lords some time ago required the Court of Session to transmit to that House copies of their acts of sederunt then in force?—In 1808 the House of Lords requested a report from the Court of Session of what acts of sederunt were then in force, and the judges who were on the bench in 1810 gave reasons for not making that report, and did not make it.

382. Did they assign as a reason for not making the report required, the difficulty of distinguishing what acts were in force and what were not?—That was part of the reason assigned by the judges in 1810.

383. What other reasons did they assign, so far as you know?—That making such report was inconsistent with their avocations as judges.

384. Can you produce a copy of the refusal of the judges to furnish that report to the House of Lords?—I can produce a copy of the reply given by the judges of the Court of Session to the House of Lords, but I do not think that it can be exactly termed a refusal.

385. The *Lord Advocate.*] Where did you get a copy of this reply?—It is engrossed in the books of sederunt.

386. Mr. *Horsman.*] Is it in the work you published?—It is quoted in the preface, but of course it remains in the books of sederunt of the court.

387. Sir *W. Rae.*] Has there been any subsequent application from the House of Lords to the same effect?—None that I am aware of.

388. Mr. *Wallace.*] Can you produce to this Committee a copy of that document as contained in your Abridgment?—I can, if wished, in a short time; but it must be in the House of Lords.

389. Dr.



389. *Dr. Lushington.*] You have stated that at present the suitors of the court have the choice of selecting their own lord ordinary; does not that lead to an accumulation of business on one or two of the lords ordinary, and leave comparatively speaking very little to do for the others?—The same accumulation would occur, although there was no such option given to the pursuer.

390. Why?—Because, as we know beforehand, (I mean that the agents know beforehand,) in what particular week a lord ordinary is to come out, we could execute the summons at such a time as would secure it going before that judge, if he take up all the cases by rotation.

391. Your answer shows, that without having the absolute means of selecting the lord ordinary, still by another mode of proceeding you accomplish it; but my question is, whether it does not lead to a great accumulation of business upon one or two lords ordinary, and leave the others comparatively much less to do?—It does.

392. And to a considerable extent?—And to a considerable extent.

393. *Mr. Wallace.*] Has the business of the Court of Session increased or diminished during the last 20 years?—It has diminished.

394. To what do you attribute that decrease?—To various causes.

395. Mention the causes?—First, to the repeated experimental changes that have been made by Parliament on the form and constitution of the court; secondly, to the introduction of jury trial in its present form and to its present extent; third, to the extension of the jurisdiction of the sheriffs; fourth, to the delay and expense to which suitors before the court are subjected; fifth to the manner in which the law is administered; and, lastly, that the recommendations made by the Law Commissioners for Scotland in their late reports have not yet been carried into full effect.

396. Will you state to the Committee what is the course of procedure in an action in the outer house?—Within 13 days after the summons is called in court, the defences are lodged and the case is then enrolled before any of the five lords ordinary that the pursuer chooses; if at the calling of the case both parties are not ready to close the record upon the summons and defences, which is very seldom the case, there is an order pronounced for lodging what are termed condescendences and answers; those are allowed to be revised by the parties respectively, and when the parties have done with their revisal, the record is closed and the case enrolled before the Lord Ordinary for debate; a copy of the record is transmitted to the Lord Ordinary; when the case is called in the debate roll, the counsel for the parties are fully heard and are allowed to state or recapitulate all the facts that are mentioned in the record, and to support their respective sides of the case by arguments and references to authorities and precedents; the Lord Ordinary takes notes of what has been stated by the counsel at the bar;—his Lordship very seldom decides the case immediately after hearing counsel, but makes avisandum, and the process is sent to his own house where he writes out his interlocutor, and likewise issues a note of the reasons of his judgment.

397. Is this practice you have now described satisfactory?—It is, I think, generally speaking, except that complaints are made against repeated revisals of the condescendence and answers being allowed.

398. *Sir W. Rae.*] Could a change in that be safely made, in your opinion?—I think the parties might safely be restricted to two revisals, except upon special cause shown.

399. *Mr. Wallace.*] Is the Lord Ordinary directed by the statute to state, in the note you have spoken of, the reasons for his judgment?—He is, by the Judicature Act.

400. Has the issuing of such note proved beneficial?—I rather think that it has not.

401. From your experience, would you be of opinion that the issuing of such note should be discontinued by the lords ordinary?—I should rather say that it ought to be discontinued, or at all events that they should be constructed differently from what they are at present; the note of reasons issued by the Lord Ordinary sometimes extends to 20, 30, or 40 pages, and I think that there must be a certain feeling on the part of every judge that his decision should not be revised, and that is apt to lead him into converting his note into a pleading for that side of the case to which his interlocutor has leaned; theoretically, the issuing of such notes of reasons I think right; but, practically, they have been found the reverse.

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402. Mr. *Horsman*.] That is, that it has come within your experience that those notes have been converted into lengthened and anxious pleadings in the case?—It has.

403. Mr. *Wallace*.] What is the procedure of the inner house when a judgment of the Lord Ordinary is brought under review?—During session time a reclaiming note is lodged by the party dissatisfied with the Lord Ordinary's judgment, within 21 days after it is pronounced. There is prefixed to that reclaiming note a copy of the Lord Ordinary's interlocutor and of his note of reasons, and there is appended to the reclaiming note a copy of the summons, defences, revised condescendence and answers, and pleas in law for the parties, and also any productions which the party reclaiming may think fit; the reclaiming note itself is strictly confined to a mere prayer that the interlocutor complained of should be altered in whole or in part. The reclaiming note is first called in the roll called the Roll of Single Bills, and if no objections are stated in point of form to that note, it is remitted to what is termed the Short Roll.

404. What takes place when the case is called in the Short Roll?—Two counsel on each side generally appear for the parties; but I think it more common for the senior counsel alone to address the court. The counsel for the person who has presented the reclaiming note speaks first generally, makes some observations upon the *rationes decidendi* assigned in the Lord Ordinary's note; the counsel for the respondent makes some observations in reply; the judges then forthwith proceed to deliver their opinions from the bench, and the case is thus disposed of.

405. Do the judges appear to have formed any opinion upon the matter before coming into court?—They do generally appear to have formed some opinion. I have heard it stated from the bench by a judge, for example, that upon reading the record he had had no doubt about the case, and I may say so from my observation also generally.

406. Do you mean to state, that, when a reclaiming note is put out for hearing, the counsel have to address judges whose opinions appear to be in a great measure already formed?—I do.

407. Does this appear to create a certain degree of impatience on the part of the judges in hearing counsel?—It does.

408. Are you of opinion that the record and the other papers submitted to the consideration of the inner-house judges are sufficient to enable them to form a correct judgment on the merits of the case?—I do not think so. The papers that are before them, if framed in the terms of the Acts of Parliament and sederunt, contain mere brief statements of the facts and pleas in law, the bearing of which upon the real merits of the case is often by no means obvious; and indeed those papers are sometimes so framed as in a certain degree to conceal what is the strength of the case of one or other of the parties.

409. Is the note of reasons annexed by the Lord Ordinary calculated to assist the inner-house judges in forming a correct opinion?—I humbly think that it is not, when such notes are framed in the manner they frequently are.

410. Why do you think so?—It is calculated to impress upon the court that view of the case which the Lord Ordinary has taken up.

411. Does it happen that many of the interlocutors of the lords ordinary are altered by the inner house?—The interlocutors of some of the lords ordinary are frequently altered, and others not so frequently.

412. How do you reconcile that fact with your opinion, that the Lord Ordinary's note of reasons impresses his view of the case upon the court?—A note of reasons may be so framed as to induce the court to confirm a wrong interlocutor, and, on the other hand, a note of reasons may be so framed, that the court are induced not to confirm a right interlocutor.

413. Are the judges in the outer house apparently in use to form their opinions after reading the record, and before hearing counsel debate the case?—They are not, and I have heard of one lord ordinary at least who purposely abstained from reading the record, in order that his mind might not be biassed before hearing counsel.

414. Do the counsel generally, in debating a case before the Lord Ordinary, go over the whole facts of the case, and make their comments and references to authorities in such a way that the judge may comprehend the merits independently of any previous knowledge he may have obtained from the record?—Yes.

415. What time does such a debate in the outer house usually occupy?—  
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I should say about two hours in an ordinary case; I have seen a case debated 24 hours before the Lord Ordinary, on successive days.

416. After such a debate, does the Lord Ordinary take the process to his own house before he pronounces a decision?—He does generally.

417. Then about what time is usually occupied in debating the case before the inner house upon a reclaiming note?—From a quarter to half an hour the counsel are heard generally.

418. Do you mean to state that the facts of the case and the arguments of counsel are fully brought under the consideration of the inner house in so short a time as half an hour?—I do not; the counsel trust to the inner-house judges having made themselves masters of the facts of the case from reading the record.

419. But have the counsel or the parties they represent any security that the inner-house judges have really read the printed papers submitted to them?—They have the security that it is understood to be the duty of the judges to do so.

420. Are those papers printed for the perusal of the inner-house judges more full of information than those submitted to the outer-house judges?—The papers are the same, with the addition of prints of the Lord Ordinary's interlocutor and his note of reasons.

421. Does it not appear, then, that the same propriety and necessity exists for stating the case fully to the inner-house judges as to the single judge in the outer house?—I humbly think that there is even greater propriety and necessity.

422. It has been stated confidently, that the inner-house judges do not hear counsel as patiently and deliberately as the outer house judges; have you any knowledge of that fact?—I do not think that the inner-house judges hear counsel as patiently and deliberately as the outer-house judges.

423. Is the mode in which the inner-house judges dispose of the cases brought under their review satisfactory to the suitors, so far as you know?—Certainly not.

424. Can you inform the Committee how the present system of hearing cases brought under review has originated?—From a circumstance which I stated in a previous part of my examination, that the inner-house judges were accustomed to decide cases only after having read full written pleadings in the form of petitions and answers.

425. Has any improvement been proposed with regard to the procedure in the inner house as a court of review of the judgment of the Lord Ordinary?—There has; in the First Report of the Law Commissioners for Scotland, about six years ago, from which, if it is the pleasure of the Committee, I shall read their recommendation; it is page 40 of that Report:

“MODE of hearing PARTIES ON RECORDS.

“HAVING offered our suggestions as to the mode in which the record should be prepared in the different classes of actions, it may perhaps be thought that we have exhausted the directions of our commissions upon this part of our duty; but it humbly appears to us that we are not merely entitled, but bound, to submit any suggestion that appears to us to be of importance in regard to the mode in which the records are to be treated by the judges, with a view to the ultimate decision of the case. If it is of importance that the records should be properly prepared, it is of equal importance that when so prepared, the questions which they are intended to raise should be discussed and decided in the way best calculated to secure the most ample and well-advised deliberation of the judge, and to inspire respect and confidence amongst the litigants in the ultimate decision. No complaints have been made of the manner in which cases are heard and decided by the lords ordinary; on the contrary, we have every reason to believe, as well from our own experience and observation as from the evidence we have had, that no dissatisfaction exists, and that no improvement can be suggested. But we are under the necessity of observing, that the mode in which cases are usually heard and decided by the two divisions of the court has not given equal satisfaction. This does not arise from any want of talent, legal knowledge, and laborious exertion on the part of these learned judges in studying the cases brought before them, but from the manner in which the cases are studied, and opinions upon frequently, if not almost invariably, formed before there is any opportunity of hearing the argument urged by the counsel for the parties. Upon this subject we do not think that we can better explain either the evil to which we allude; or suggest the remedy which ought to be applied to it, than by quoting the evidence upon this point of the Dean of the Faculty of Advocates. The question was put to that learned gentleman, ‘Is it consistent with your observation as a practising lawyer, that greater satisfaction is felt by the profession in regard to the way in which cases are heard and decided in the outer house by *viva voce* pleadings, than to the way in which they are heard and decided in the inner house?’ The answer is as follows: ‘Most assuredly, according to my opinion and observation; but in answering this question you must allow me fully to explain my meaning, in order to prevent miscon-

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struction, and to avoid the appearance of unbecoming and presumptuous reflection, when there is truly no room for such observations, even by a person entitled to make them. Up to the period when so great a change was made by the Judicature Act, all the cases in the inner house, with very few exceptions, were decided upon written arguments. These the judges carefully studied at home before the day when the cause was in the roll, and they had therefore necessarily and properly formed their opinions deliberately at home, which were not likely to be altered by supplementary and short observations in court, at least in the generality of cases. A great proportion of the causes now come into the inner house merely upon a record without any written argument whatever; the judges, however, very naturally, and certainly from the most conscientious motives, have kept up the practice of laboriously studying the record before the case comes in the roll, so as to make themselves completely master of the case, as far as that is possible, without the aid of argument from the parties, and accordingly, in a great proportion of the cases, have thus necessarily, and beyond all doubt, in the way most laborious to themselves, formed their opinion, or at least the strongest possible impressions upon the case, before counsel are heard upon the case at all; now, with great deference, when the change was made from written arguments to *viva voce* pleadings upon the records, it appears to me that the pleadings in court should be conducted as in England, upon the very opposite principle; I think the record should not be looked to at all by the judges before the case comes on in court, or at least only in the most summary manner, and not beyond a glance at the summons and defences. The case then should be fully opened, as in the House of Lords, to the court, as ignorant both of the nature of the action, of the facts, of the pleas, and of the interlocutors of the Lord Ordinary; and then, after such full argument, the court may, in some simple cases, be prepared for decision, but, as would generally happen, should thereafter read the records and consider the pleas and arguments of parties carefully at home; this would take up a little more time in court, and confer greater labour certainly, upon senior counsel; but I am quite persuaded that it would make the reading of the judges at home, now so extremely severe and laborious, and necessarily so irksome and troublesome when they have to study a case totally unassisted with any previous argument, not only much easier to themselves but infinitely more profitable, as the case will then be read with a correct apprehension of the bearing of all the facts; it never could have been contemplated, when written arguments were to be dispensed with, that the case was to be studied with a view to deliberation and opinion before the parties had ever been heard at all; on the contrary, the substitution of the mode of pleading in England ought necessarily to accompany such a change, and the reading by the judge should be after the case is pleaded. Another important reason for this course is studied with an elaborate interlocutor, and perhaps a full opinion in the shape of a note by the Lord Ordinary before the party has been heard at all upon the case, a state of things which seems to be quite inconsistent with the legal right to reclaim against that judgment; the result is great dissatisfaction on the part of litigants for cases which have been debated at great length before the lords ordinary are disposed of in the inner house, owing to the judges having formed their opinions principally upon the records, with very few and comparatively imperfect observations in the inner house; and it often happens that, though the counsel on both sides concur in the judgment, they equally concur in noticing, in many necessary misapprehensions of parts of the case, which they know, if the case had been considered only after full debate, could not have occurred; and clients, of course, attach to them undue importance, thinking that they enter more than they do into the grounds of the judgment. Again, another unfortunate result is, that the case is disposed of in the inner house upon much shorter and less authoritative opinions than would be the case if the judgment were delivered, in most cases, upon the following day. This operates in a way that the judges themselves are not fully aware of; for, first, the cause goes to the House of Lords, although it has been most anxiously considered by the court, often with the shortest possible opinions, which we see tends to diminish the authority of the judgment; and then, secondly, though the court, in affirming the interlocutor of the Lord Ordinary, are not bound to concur, and state that they do not concur in many of the reasons assigned in his note; yet when they do not give full and elaborate opinions themselves, the only full judicial opinion which enters the reports is that note of the Lord Ordinary; and, of course, after the lapse of time, necessarily comes to explain and form the grounds of the decision when afterwards appealed to. Now, I have no difficulty in saying that a great many cases thus enter the reports in which the note of the Lord Ordinary must form in future the law of the case, when subsequently quoted and appealed to, although it was manifest at the time that the court went on very different grounds. I think it is important, in almost every case, that one full opinion should be given in the inner house, even when unanimous. Certainly the opinions now delivered, although by the same judges, are, in the generality of cases, as the reports demonstrate, much less full, and much less useful and instructive, than they were formerly, when delivered on written arguments. The reason is plain; the opinion is now generally formed, or nearly so, before the parties are heard in court; but then, as counsel are still to be heard, and the impression may be altered, the opinion cannot be prepared and studied before-hand; and when the case is decided immediately in court, it necessarily can neither be so precise and authoritative as to principle, nor so luminous as to facts, as when previously prepared. The present practice, I am confident, is the most laborious and the most irksome to the judges, and has naturally arisen from the previous habit of close and most conscientious reading at home, in order to be masters of the case when it comes on in court

court. Now, I apprehend they should be made acquainted with the case for the first time by a full *vis à voce* pleading in court, and then should deliberately study the case at home, with a view to give judgment on a future day; and I am thoroughly confident that this change would not only be infinitely more satisfactory to the country, but attended with a very great relief to the judges themselves, and would be found to be more satisfactory also to them.' We most fully concur in the conclusions of this opinion, as well as in the reasonings and grounds upon which it is formed. We have further to state, that the opinions of the professional persons whom we have examined, including all those who have had the best opportunities of observation of the proceedings ever since *vis à voce* pleadings were introduced, are unanimous and clear, and entirely in unison with those which we have ourselves formed from the result of our own experience and observation. The feeling is universal, that in order to give fair effect to the regulations in regard to the record, to restore the confidence of the country in the judgments pronounced by the Court of Review, and to relieve the judges themselves from acting under a system so much at variance with the important and indispensable objects of a patient hearing and full consideration of the cases, it is necessary that some means should be resorted to for remedying this evil. The remedy suggested in the abstract which we have given from the evidence of the Dean of Faculty appears to us to be the best that can be resorted to. We are of opinion that cases ought to be heard in the inner house without any previous perusal of the record farther than perhaps an inspection of the summons and defences, and that after cases are so heard, the delivery of the judgment should be postponed till the following or such other day as the court may deem it to be necessary for the object of full consideration of the argument and record together. We are persuaded that this would be a great and advantageous change in the course of procedure, and that judgments thus pronounced would tend materially to diminish the number of appeals to the House of Lords, which we have reason to know have often been resorted to from an impression on the minds of the parties that the judgments, though not perhaps erroneous, had not been pronounced with due consideration."

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426. It has been alleged that the judges of the Court of Review show considerable impatience when counsel proceed to state their cases before them; I wish to inquire if you have observed this, and whether it is not discouraging to counsel to address the judges of the inner house of the Court of Session, when they discover that the judges have preconceived opinions, which they have acquired from reading the records and the notes of the lords ordinary?—I must say that I have.

427. Is it frequently necessary, in the course of a process before the Court of Session, to grant a commission for the discovery of writings, and the examination of the havers or possessors of those writings?—It is.

428. To whom are such commissions granted?—When a commission is to be executed in the country, it is generally granted to the judge ordinary of the bounds; when a commission is to be executed in Edinburgh, it is frequently granted to some junior counsel named by the judge.

429. Does the commissioner in such cases receive a fee?—He does.

430. Has this proceeding caused frequent disputes with regard to the course pursued by the commissioner?—Occasionally.

431. And caused loss and delay to the suitors, and also delay to the court?—To a certain extent.

432. In what manner does this arise?—That the commissioner sometimes admits writings to be recovered, and sometimes rejects the application for their being recovered, as not falling within the specification of writings.

433. Sir W. Rae.] Is any specification of the writings to be recovered given when the commission is granted?—It is; but it is frequently left so very general, that much is left to the judgment and discretion of the commissioner.

434. Mr. Wallace.] Would an improvement in this respect tend to take away the present dissatisfaction existing in the court?—I think it might; I think that all commissions to be granted by the inner house, to be executed in Edinburgh, might be granted to one of the principal clerks of session; and that all commissions to be granted by the lords ordinary, to be executed in Edinburgh, might be executed by the depute clerk attached to the Lord Ordinary.

435. You have mentioned, among the various causes that have tended to reduce the business of the Court of Session, and cause dissatisfaction with it, that the expense and delay is very considerable; now I wish to inquire whether the frequent remitting of cases to accountants in Edinburgh is not an additional cause to any you have stated?—The custom of remitting processes which involve matters of account or calculation and figures to an accountant in Edinburgh to examine and report, is frequently attended with very great expense to the parties.

436. Is that very much complained of by the suitors?—The expenses claimed by the accountant are often the subject of complaint.

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437. Under what circumstances are those remits made?—Wherever the question seems to be one of accounts or figures.

438. Is it true that the accountants, when remits are so made, are permitted, under the remit from the judge, to decide upon questions of law and questions of evidence?—They do, or rather report their opinion upon matters of law and on evidence to the judge from whom the remit proceeded.

439. Are the accountants educated and trained in any way to fit them for such a decision?—There is no society or corporation of accountants, and I believe there is no training or course of study prescribed by the court for those accountants to whom judicial remits are made; but they are a very respectable class of men.

440. You have mentioned that the introduction of jury trial in civil cases is a cause of the decrease of business in the Court of Session; how does this arise?—Because there is a large class of cases which, if brought into the Court of Session, must be remitted for trial before a jury, and frequently at an expense totally incommensurate with the amount of the sum at stake; neither the judges nor the parties have any option whether those cases shall be sent to trial before a jury or not; the same case, if brought before the sheriff, may be decided on without the intervention and without the expense of a jury.

441. Do you attribute to those causes so few jury trials before the Court of Session?—I do; a remit for trial before a jury is very frequently followed by the parties either abandoning or compromising the action, or entering into a judicial reference.

442. Does not almost always, if not always, a single judge preside in the case of jury trials?—I believe almost always.

443. Does your professional knowledge enable you to state to the Committee whether part of the duties at present performed by the Lord Ordinary might be devolved on other parties with advantage to the suitors?—I am not aware that any could be so devolved with advantage, although I have heard it proposed that the clerks of the court should act the part of judges in common matters of routine.

444. Does it not frequently happen that the business of the courts of the lords ordinary, as well as the inner houses, is interrupted, because the counsel are not present to proceed with their duties?—Frequently.

445. Does not one or more of all the courts occasionally rise for the day, in consequence of the absence of counsel?—All the courts would not rise on the same day; but some of them may, in consequence of the absence of counsel otherwise engaged.

446. Then it is of frequent occurrence that the courts absolutely are obliged to suspend business for want of counsel?—The business before them is at all events frequently postponed.

447. In the courts of the lords ordinary, does it frequently happen that an entire stop is put to the various procedures, because counsel are at other bars, and cannot attend at the bars of the lords ordinary?—It is.

448. Is not that a great cause of delay, as well as of expense, to the suitors?—Necessarily.

449. Does the intervention of counsel appear to you to be necessary, in moving for decrees in absence, and matters of mere form and routine that take place now before the lords ordinary?—It does not; I think in cases of decrees in absence, and indeed in all matters in what are termed the motion rolls of the Lord Ordinary, it should be optional to bring up counsel or not.

450. Sir *W. Rae*.] Do not those motions occasionally give rise to debate?—Sometimes they do.

451. By whom would the debate be conducted, in case counsel are not present?—In the same way as bill-chamber cases are at present and have been for some time past conducted, namely, by the agent in the case.

452. Mr. *Wallace*.] Has any inconvenience been found from that practice in the Bill Chamber?—None whatever that I am aware of.

453. *Chairman*.] Suppose the alteration desirable, how would it be effected by an act of sederunt, a regulation of the court, or must it be by Act of Parliament?—I should suppose that an act of sederunt would be quite sufficient.

454. The *Lord Advocate*.] To do what?—To enable the agent to move for all decrees in absence, and to make motions in the motion rolls.

455. Mr. *Ewart*.] Would it save the time of the court materially?—It would save the time of the court, in consequence of the counsel being frequently otherwise engaged.

456. *Chairman*.]

456. *Chairman.*] Would it save the time of the court to any extent worth mentioning?—I think it would very much save the time that is occupied at present by the lords ordinary in calling their motion rolls, because from the counsel not being so well versed with the circumstances of the cause, mis-statements are frequently made of matters of fact, which would not be made if the statement emanated directly from the agent.

457. *Sir W. Rae.*] As regards decrees in absence, does it consist with your knowledge that the court has been stopped for five minutes on account of the absence of counsel to ask a decree in absence?—No, certainly not.

458. One counsel can act in this respect for another?—Yes, in matters of decrees in absence.

459. *The Lord Advocate.*] Decrees in absence do not require any statement?—No.

460. It is given as a matter of course?—Yes.

461. You have not to state the question to the judge, and the judge form his opinion, but you ask the decree in terms of the summons or condescendence, and the judge looking at the one or the other, says "*Fiat*"?—The time is only consumed in getting up the counsel, and a certain expense is incurred by it.

462. *Dr. Lushington.*] You have stated that some inconvenience arises from the counsel not being so well acquainted with the circumstances as the agent; what is it that the agent ought to know better than the counsel, as it is a mere matter of form?—Many circumstances, such as in processes of multiplepinding of a very complicated nature, involving a great many particulars which it is impossible for a counsel who is engaged in some hundreds of causes to recollect, but which the agent, from having fewer causes, and from the details being more constantly before him, must know better.

463. But these are motions of course to which you were asked; are those motions of course attended with any detailed statement?—I did not allude to motions of course only.

464. You alluded to matters that might be the subject of litigation and discussion; is that so?—I alluded to matters that might be the subject of discussion.

465. Cases in which the Lord Ordinary had to exercise a discretion?—Yes.

466. Not mere matters of form?—No.

467. *Mr. Wallace.*] But in unopposed matters of form, would not the agent being allowed to move those expedite the business of the Lord Ordinary?—Certainly.

468. Was it to those cases you alluded in making your first statement as to the convenience by act of sederunt, of permitting an optional power to the counsel or agent to move in such matters of form?—It was to those as well as the others.

469. *Mr. Ewart.*] Would an agent be competent to undertake such matters?—I humbly think he would, judging from the experience of many years in Bill-chamber cases before the junior Lord Ordinary, which are frequently of very great importance.

470. *Sir W. Rae.*] You contemplate the head agent always being present, and nothing being done by the clerk?—Yes, I do.

471. Would the saving be great in that case of the suitors?—I consider there would be a very considerable saving both of time and expense.

472. Are counsel always feed for mere motions of form?—Sometimes they are and sometimes they are not, and it is in consequence of their not being uniformly feed and the auditor sometimes disallowing the fee, that agents are averse to trouble counsel with any previous preparation before coming up to the bar.

473. *Mr. Wallace.*] Do you mean to state that the counsel are instructed at the bar to make these motions?—They are frequently instructed after they come to the Parliament House in the morning, or on the case being called.

474. What is the usual hour of the Lord Ordinary proceeding to court in the morning?—Nine o'clock.

475. Do all the lords ordinary go at nine o'clock?—Some may be a little later; but that is the general hour.

476. Can you state what is the usual duration of the sitting of those lords ordinary?—Till two o'clock of the same day, except upon Saturdays, when they generally rise about one o'clock.

477. Can you state what is the usual duration of the sittings of the inner house of the Court of Session?—I think about two hours a day.

478. Then the court, with four judges, sits two hours a day, whilst the courts having one judge only, sit five hours a day?—Yes.

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479. Do

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479. Do the lords ordinary sit every day in the week?—Every day except Monday and holiday during session.

480. Sir *W. Rae.*] Are you sure of that, that they sit every day in the week except Monday?—Some lords ordinary do.

481. Mr. *Wallace.*] You were understood to say that the Lord Ordinary sits five days a week?—Each lord ordinary sits four days a week.

482. Do both divisions of the inner house, the four lords ordinary and the issue clerks of the jury court, sit all at the same time?—They do.

483. May not the same counsel be feed to appear at all those seven bars at the same time?—It is possible.

484. Is not the frequency of such occurrences one cause of obstructing the business of the courts?—It is.

485. Is it complained of by the suitors before the courts?—It is.

486. Is one of the evils the postponement of cases in consequence of the absence of counsel?—Certainly it is.

487. You have stated that considerable dissatisfaction is known to exist respecting the mode of transacting business in the Courts of Session, and you have stated that you do not think that fewer judges than the present number of 13 could perform the duties; have you given attention to the fact of the long vacations which the courts have?—I have; I conceive that if the sessions were increased that the business would, in all probability, proportionally increase.

488. Might the vacations be advantageously shortened, in your opinion?—I think they might.

489. It has been suggested to this Committee, that the impatient manner in which cases are heard in the inner house would be improved by the judges being transferred there without any interference on the part of the court with the present practice; is that your opinion?—It is not.

490. Supposing that vacancies were to occur in the inner houses, and the whole of the lords ordinary were to be transferred there, do you believe that the mere act of their transference would improve the system of hearing causes in the inner courts?—Looking at the fact that it is six years since the Law Commissioners reported that the mode of hearing causes in the inner house should be altogether changed, without any alteration having been made, though the recommendation proceeded upon the evidence of Mr. Hope, the Dean of Faculty, a person whose experience and talent are so well known to the court; I do not think that although five of the present inner-house judges were superseded by the present five outer-house judges, there would be any material change in the mode of hearing causes in the inner house.

491. *Chairman.*] During that period of five years, how many of the outer-house judges have been transferred to the inner house?—I cannot speak precisely from recollection; I am sure of two.

492. Mr. *Wallace.*] Who were those?—Lords Fullarton and Corehouse.

493. Were not those very eminent judges in the outer house?—I hope all the judges of the court are eminent.

494. *Chairman.*] They were transferred by seniority?—Yes.

495. Mr. *Wallace.*] They were as eminent as any of their brethren?—Yes, certainly.

496. You have, I think, alluded to the arrears of business in the outer house?—I have.

497. Are you of opinion that the lengthening of the sittings of the court, and shortening the vacations, would reduce the number of those arrears?—Certainly.

498. What would be the effect upon the courts as a whole; that is, upon the five outer-house courts and the two courts of review, by lengthening the sittings three months in the year beyond their present endurance?—They would be able to get through more business.

499. Would you anticipate their removing the arrear entirely, provided they were to sit that additional three months?—It is impossible to say, in consequence of no one being able to foretell the accession of business that such constant sittings would create.

500. Is the Committee to understand you cannot form an opinion upon it?—I should think that shorter vacations would have a very great chance of diminishing the arrear of business.

501. Sir *W. Rae.*] Has not there been an alteration in the length of the sittings of the Lord Ordinary lately?—Yes.

502. Has

502. Has that come as yet into full operation?—It came into operation in November last.

503. What was the change then?—The sittings were extended from the 12th to the 20th of March.

504. Was there any alteration in the commencement of the winter session?—The lords ordinary began their sittings on the first Tuesday in November, in place of the 12th, as formerly.

505. That experiment has not yet had a fair trial?—I think not.

506. Mr. *Ewart.*] Is that the only alteration?—No.

507. Sir *W. Rae.*] The arrears in the outer house are those of particular judges?—They are.

508. Is it quite clear that the lengthening the sessions would diminish that arrear?—It is not quite clear, but it would have a natural tendency to do so.

509. Might not more causes be brought before the judges, they being favourites, in consequence of their having more time to dispose of them?—There might.

510. And the arrear remain as large as at present, leaving the other judges still less business?—Certainly.

511. Mr. *Wallace.*] The arrear of business you have alluded to would be created by a fresh accession of business, would it not?—It would.

512. Supposing the business not to increase, then the arrears would be diminished by the increased sittings you have spoken of?—Undoubtedly.

513. There are two courts of review that sit at the same hour, with the same number of judges, and the same counsel to serve them; I wish to inquire whether it is your opinion that the same uniformity of judgment is obtained as if the duty could be performed by one court of review?—Two divisions composed of different individuals are certainly more apt to differ in opinion than a lesser number of individuals formed into one court.

514. Sir *W. Rae.*] Will you explain that answer a little fuller?—I mean to say, that eight judges divided into two courts are more likely to entertain a diversity of opinion than a lesser number of judges composing one court.

515. Mr. *Wallace.*] You have stated the inconvenience which has arisen from the same counsel being required to be at more than one of the bars at the same time; would it not be a great convenience to the business of the Court of Session if counsel were to be so divided as to have particular courts to attend?—It would be a great convenience, if it can be supposed that counsel of equal talent could be procured.

516. As it is impossible to suppose that counsel of equal talent can always be found, I wish to put the question whether or not it would be a great convenience in furthering the business of the Court of Session, that counsel should be divided into classes, so that the same interruption which so frequently takes place now might not occur in future?—I am not prepared at present to give any opinion upon that question.

517. *Chairman.*] Would you not consider it a great infringement upon the professional rights of any gentleman to restrict him from practising in any particular court?—That is a separate question.

518. Dr. *Stock.*] You have stated to Mr. Wallace that, in your opinion, a court divided into two divisions is more likely to differ in their judgment; is it your opinion that the division of the inner house into two divisions may not be productive, in the long run, of great advantage, by producing unanimity of opinion upon matters of law, as each court is under the check of the other, and the matter is examined and re-examined under different tribunals?—I think that the division of the court that took place in 1808 has been a great practical advantage in many respects, and that that division should continue.

519. Do you consider, in point of fact, that the result I have mentioned has taken place,—that this division of the Court of Session (being the court of ultimate jurisdiction in Scotland) into two has tended to produce unanimity of judgment in their judicial decisions, by placing each court under the check of the other, and similar questions coming before the same courts?—I think, from the emulation that must arise from there being two courts judging of the same matter, that there is a greater chance of the public being better served and more deliberately served by two courts than by one.

520. The *Lord Advocate.*] Do you think that the hearing in the inner houses has not been at all improved during the last two years?—Very little indeed.

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521. Do you think Lord Corehouse's presence there has not improved it?—I was not sensible of it.

522. How do you propose that causes should be heard in the inner house, so as to ensure the merits being fully considered?—Precisely in the same manner as they are heard in the House of Lords when brought there by appeal.

523. Would you give the judges the papers or withhold them?—I see no harm, on the contrary much advantage, in letting the judges have them, as the Lord Chancellor has them now; but that they should be as much read after hearing counsel as before.

524. And you would have no note of the ordinary?—No; unless those notes are constructed very differently from what they are at present.

525. How would you have them constructed?—Certainly in such a way as to exclude all argument in favour of the side of the case and for which the Lord Ordinary has decided, and being as particular as the rules in making records are in regard to the separation of matters of fact from matters of presumption and inference.

526. You would have the Lord Ordinary's note to contain a statement of his opinion, but not an argumentative statement of his opinion?—I would.

527. Mr. *Horsman*.] You have stated as one of the reasons why the business of the Court of Session has diminished, the manner in which the law was administered?—I did.

528. And you stated afterwards that the proceedings in the inner houses were not satisfactory to the suitors?—I did.

529. Is that dissatisfaction very general?—Very general.

530. And general in the profession, both amongst counsel and solicitors?—Amongst both; but of course I can speak more particularly of that branch of the profession to which I myself belong.

531. From your own experience, do you think that that dissatisfaction is well founded?—I humbly think so.

532. Have you explained to us all the reasons for that dissatisfaction?—I think I have stated the most prominent.

533. Are there others you have not stated to us?—None occur to me at this moment that I ought to state to this Committee.

534. You stated, that the public had a security in its being understood to be the duty of the judges to read their papers before they came into court?—They have.

535. Are they satisfied with that security?—The public, I think, feel generally that the litigants are entitled to the additional security of having matters of fact recapitulated in the presence of the judge, in the same manner as is done in the House of Lords.

536. You stated that they had the security, that it was the duty of the judges to study their cases?—I have stated that it was understood to be the duty of the judges.

537. Is the public satisfied with the security which is thus afforded them, in its being the duty of the judges to study the papers before they come into court?—I have already stated that they wish the additional security of having every thing that is stated in the papers re-stated *viva voce* by the counsel at the bar, if the counsel think it necessary, in each particular case.

538. Sir *W. Rae*.] What prevents it being done, if the counsel think it necessary?—Judging from the recorded opinion of the head of the bar, Mr. Hope, and believing he speaks the sentiments of his brethren, I do not think that the omission to make a full statement to the court originates with the bar.

539. Mr. *Horsman*.] Is any part of the dissatisfaction that exists owing to the impression that the duty on the part of the judges of preparing themselves in their cases before they come into court is not performed?—I believe that a great part of the dissatisfaction arises from the profession not being very certain whether the judges have prepared themselves fully before coming into court or not, and being unable to decide with certainty the extent of the observations they ought to address to the court.

540. Has that impression been in any ways strengthened by occurrences in court, by the appearances which any of the judges have made during the progress of the pleading?—Some judges appear to think it necessary for them to read the whole of the printed papers that are boxed for them more fully and attentively than others.

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541. Is there an impression, whether well or ill-founded, that the judges do come into court and decide cases, not having prepared themselves in the cases they are called upon to decide?—There is a strong impression, that cases are decided by the inner house without the judges being so fully aware both of the facts and the law of the case as would be desirable.

542. Dr. *Lushington*.] Is there an impression that the judges decide the causes without sufficient reading or hearing?—Certainly.

543. Mr. *Horsman*.] Is that impression very general?—Very general.

544. *Chairman*.] Supposing the spirit of the Judicature Act of 1825 to be fully carried out, would not that impression, to a very considerable extent, be removed?—I think that it would be wholly removed.

545. Mr. *Horsman*.] Have such facts as these occurred from which counsel can judge whether or not the judge had read the papers or not; in the course of the pleading, has it occurred, in your experience, that a counsel has been interrupted, by the judge telling him he is stating facts of which the court has no knowledge; and, having been referred to the papers in his hand by the counsel, he has found the fact before him, of which he must have been aware, if he had read the papers?—I have seen such a thing occur in regard to the productions in process forming part of the appendix to the reclaiming note.

546. Does not that operate against suitors in a double point of view; in the first place, showing that the case itself has not been sufficiently studied; but does not it also place the counsel in a very unpleasant position, that he has to point out to the judge a fact of which he has shown he was ignorant?—Were I a counsel, I should have no delicacy or hesitation in pointing out any thing material to my client's case.

547. Does not it place him, with the judge, rather in an awkward position, as it were?—Not with a right-minded judge.

548. Mr. *Ewart*.] Would those omissions which are complained of be removed by making the proceedings of the judges more public?—I humbly think it is a great disadvantage that the judges of the inner house of the Court of Session deliver their opinions immediately after hearing the counsel state the case, and when perhaps very few persons are in court; that it would be most desirable that a day or a time should be set apart for the judges delivering their opinions, as I believe is the practice in some of the English courts, when the whole or a great part of the bar would, in all probability, be present.

549. Mr. *Wallace*.] Are you of opinion that the want of consideration alluded to, is equally applicable to both divisions of the court?—There may be a shade of difference, but I do not think it very material.

550. Dr. *Stock*.] From the result of your own practice and experience, is it your impression that the opinion you have stated as prevailing in the public mind with respect to the mode in which the judges proceed with their papers in their chambers is well or ill founded?—I am very much in the habit of conversing with my brethren on the subject, and I have never heard one express a different opinion to what I have now stated.

551. Mr. *Horsman*.] And your own opinion coincides with theirs?—Yes, certainly.

552. As to the impatience we have heard of as being exhibited occasionally to some extent in the inner house, do you think that that can arise from the judge understanding the case so well, that he was unwilling to hear relevant arguments upon it?—I think his impatience must arise from his conceiving that he already knows all or more than counsel can inform him.

553. Does that impatience, in your opinion, lead to injustice being committed on parties at the bar?—The parties think so.

554. Is there a general impression upon that point?—There is.

555. Sir *W. Rae*.] May not it arise from the counsel endeavouring to supplant the views the court entertained, and think it unnecessary to have remitted?—On the contrary, I rather think that the court are fully as apt to listen to one counsel as the other.

556. The *Lord Advocate*.] As well the counsel arguing in favour of the opinion the court are supposed to have formed, as the counsel arguing against it?—What I mean to state is, that if a judge has made up his mind, he is impatient in hearing further arguments, which he does not contemplate will overturn his opinion.

557. Sir *W. Rae*.] Do you not consider that a judge with due judicial feeling would be disposed to listen more anxiously to arguments tending to shake his own opinion

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opinion than support it?—It depends upon the quantity of confidence he has in the opinion he has previously formed.

558. Mr. *Horsman.*] Has it occurred to you to form an opinion whether the confidence of the judge in the case is apt to be at all proportioned to the labour he has bestowed upon it, in your experience?—That is a question which I am not prepared to answer.

559. You cannot give an opinion upon it from your experience?—No, I cannot.

560. Sir *C. Grey.*] Is it the practice in the inner house for the junior judge or the senior judge to deliver his judgment first?—I believe the rule is that the junior begins, but it is not very much attended to who begins; sometimes the one and sometimes the other.

561. Would it be within the power of the judges to regulate that by an act of sederunt, to make it a fixed practice that either the senior or the junior should begin?—It might be regulated by an act of sederunt, or by the judge in the chair asking the opinions in any order.

562. That would be leaving it without regulation; it is leaving it to the choice of the moment; could it be made a fixed rule by an act of sederunt?—I have no doubt it could.

563. Do you think that any advantage would arise from the judges having the power annually to choose in seniority, as the English judges do upon going circuit, in which of the two divisions or chambers of the inner house they would sit for the year, so as to make a different constitution in each chamber annually, if they chose to do it?—I should say, as a speculative matter, I think it would have that tendency; but the experimental changes made in the Court of Session have been so great already, I am not prepared to state that it would be an advisable alteration.

564. It might have a tendency to enable them to work together better?—Yes.

565. Do you think that it would be an improved arrangement if out of the 13 judges you could constitute three inner chambers instead of two, so that there should be a larger choice for the suitors as to which chamber they would appeal to?—I think that two chambers are quite sufficient.

566. Do you think that a larger liberty to the judges of the Court of Session of making acts of sederunt or regulating the practice would tend to the more convenient despatch of business?—I conceive that in all late Acts of Parliament regarding the Court of Session and the Sheriff's Court, sufficient power has been conferred on the Court of Session to make acts of sederunt for all purposes for carrying those acts into effect.

567. Is there any mode by which you could give the Committee a general view, or any thing like a line drawn between what the judges may do by act of sederunt, and what requires an Act of Parliament?—I humbly think that the acts of sederunt lately passed by the court show the distinct line, and that the court has observed that line.

568. Could you tell us, who are not so well informed as yourself, of the practice of the courts, and the constitution of them, what the line is, not expecting it to be any very accurate definition; do you know enough of the English courts at Westminster Hall, to say whether the Scotch Court of Session has as large a power of modifying the practice of the court as the three common law courts of Westminster Hall have?—I should say that the line is, that the court should be confined to making what are designated as rules of court, and should not at all interfere with matters on which Parliament has been in use to legislate; but in all matters of detail, carrying the Act of Parliament into full and fair effect, that the court should have and exercise, as it at present does, the power of making rules for expediting the business before them.

569. Mr. *Ewart.*] Do you think that the court has sufficient power of making regulations under the law at present?—I think so.

570. Sir *C. Grey.*] Is it your opinion that they have as large a power as the English courts?—I do not know the power of the English judges, but I have always understood that the Scotch judges possessed and exercised a greater power than the English judges.

571. Even now?—Yes, at this time.

572. The *Lord Advocate.*] You are aware that the statute of 1825 lays down very strictly the form of proceeding in the inner house?—Yes.

573. And that it cannot be altered by any act of sederunt, it being the statute law?—Yes.

574. Sir

574. Sir C. Grey.] Supposing both parties in any case were desirous of waiving the intermediate appeal to the inner house, and passing at once to the House of Lords, would it be competent to the judges, either by motion in any particular case, or by act of sederunt, to permit them to do so?—No; there is a statute that provides that there shall be no direct appeal from the judgment of the Lord Ordinary to the House of Lords.

575. In your opinion, are there any cases in which you think it desirable that that should be done?—I cannot imagine any.

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MEMBERS PRESENT :

Mr. Ewart.  
Sir Charles Grey.  
Mr. Horsman.  
Mr. Serjeant Jackson.  
Dr. Lushington.

Sir William Rae.  
Dr. Stock.  
Lord Teignmouth.  
Mr. Wallace.  
The Lord Advocate.

THE HON. FOX MAULE IN THE CHAIR.

Mr. William Waddell called in ; and Examined.

576. *Chairman.*] WHAT is your profession?—A writer to the signet.

577. How long have you been in that profession?—Since 1814.

578. What has been the extent of your practice?—It has been considerable ; not quite so much of late years.

579. Did you act as secretary to the Law Commission appointed in 1833?—I did.

580. From the beginning of that Commission to the end?—Yes.

581. And you have a practical knowledge of the mode of carrying on business before the Supreme Courts?—I have.

582. Mr. Wallace.] How many courts is the Court of Session divided into?—Into two inner chambers, and five lords ordinary in the outer house.

583. How many judges sit in the inner chambers?—Four in each when the court is full, but the court may proceed with three, which is a quorum.

584. How many in the outer house?—One lord ordinary in each.

585. Making in all 13 judges?—Yes.

586. Have you, as secretary to the Law Commission, had extensive means of knowing the opinion entertained by the public of the Court of Session?—I have.

587. Are there not strong opinions recorded in the First Report of the Scotch Law Commissioners, to the following effect : “That there has been for some time past a general and increasing dissatisfaction throughout the country with the mode in which justice is at present administered in the Court of Session?”—Yes, there are such passages expressing those opinions.

588. Does your own opinion coincide with that?—Yes, it does.

589. Can you inform the Committee from what that dissatisfaction arises?—It arises from various causes ; I would say, in the first place, from the expense of procedure ; secondly, the delay that takes place in the hearing of debates before the lords ordinary ; in the third place, the unsatisfactory mode in which causes are heard and decided in the inner chambers ; and in the fourth place, I would say the dread of parties being sent before a jury.

590. Is it with the forms of the court then that you find fault?—Partly with the forms of the court, but more particularly with the mode in which the proceedings are conducted in the inner house.

591. You have stated that there are seven separate courts?—We do not call the lords ordinary a court, exactly, but there is a separate hearing of cases going on, which is much the same thing.

592. Do not seven separate tribunals sit daily in the Court of Session?—Yes, in general six.

593. Besides that, do not the jury clerks hold a court, or something like a court?—They hold meetings upon the business of issues at the same time when those

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other courts are sitting, and very often just at the time when the most important proceedings are going on in some of those courts, which creates a great interruption.

594. Do those jury clerks insist upon counsel appearing before them with the agents?—Always; the agents are not allowed to be heard before those clerks.

595. Is that done by Act of Parliament, or by act of sederunt?—I rather think it is under act of sederunt.

596. Are causes frequently postponed to suit the convenience of counsel?—Very frequently; it happens frequently both in the inner and outer houses.

597. Do those postponements occasion long delays?—Certainly, both delay and expense.

598. May not weeks elapse sometimes before a cause can be proceeded with, after having been postponed in consequence of the absence of counsel?—Yes, a case is frequently delayed from day to day, and it may be in some instances probably two or three weeks; or if it is near the end of the session it may stand over till the next session.

599. Do you mean to state, that in consequence of delays which are created by the non-attendance of counsel, causes may even be postponed over the long vacation of four months?—Certainly; if the cause comes on before the lords ordinary towards the end of the session, and is not heard then, of course it is necessarily postponed till the next meeting.

600. Is there any division of counsel before the Scotch bar?—There is not, further than the distinction into senior and junior counsel.

601. Do you mean to state, that the same counsel may attend before all those eight tribunals?—He may attend; he cannot be in all those places at the same time, but he is competent to appear in all those.

602. May it not happen that a favourite counsel may be employed to attend before each of those eight tribunals sitting at the same time?—It is rather an extreme case to say that he is employed in all those tribunals at the same time, but it may happen; there is nothing to prevent it; a favourite counsel may be employed in the greater part; that might occur.

603. In such a case, is the court in the habit of postponing the trial, or adjourning altogether for the want of counsel?—Generally they do so.

604. Is this a matter of complaint by suitors and their agents?—It is, very much.

605. Has it been long so?—It has been for a very considerable period.

606. Would it be advantageous in saving the time of the judges, if counsel were to be so divided as to prevent the interruptions you have alluded to?—It would.

607. Would such a change be agreeable to the branch of the profession to which you belong?—It would, in so far as the agents are concerned; I think the bar might make an objection, particularly the senior counsel.

608. You are of opinion that the bar would object to such an arrangement?—I think more particularly the senior counsel; it would affect them most; but the juniors, I think, would be apt to approve of it.

609. Has it ever been in practice at the Scotch bar, that counsel should be divided in any way?—No, there is no division, except into senior and junior.

610. In what manner are causes heard and decided in the outer houses?—They proceed with the opening of the junior counsel upon each side, and that is followed by the senior counsel; the Lord Ordinary afterwards, in general, takes the case into consideration, which we call *avisandum*, and then a judgment is pronounced by the Lord Ordinary, generally with a very long note of explanation, often an argumentative note.

611. Are not those causes then taken by review, if an appeal is sought, to one or other of the inner houses?—Yes; but I may state, from returns made to the Law Commissioners, that there are no complaints in regard to the mode in which business is conducted before the lords ordinary. From returns made to the Commission, it appeared that two-fifths, and, in some years, one-half of the judgments pronounced by the lords ordinary were acquiesced in, and not carried to the inner chamber at all.

612. Are not causes heard very briefly before the inner house, in comparison to the manner in which they are heard in the outer house?—They are; that is one of the great causes of dissatisfaction, that after a case has probably occupied three or four hours of debate before the Lord Ordinary, when it is carried into the inner house it may be disposed of in half-an-hour, by the judges making a few observations, without assigning any special reasons for their judgment, and leaving the parties

parties to infer that the case has been imperfectly considered, and in this way the public are not satisfied, and it leads to many appeals to the House of Lords.

613. Are the frequent appeals to the House of Lords attributed by many to what you have now represented?—Certainly, to the unsatisfactory mode in which the case has been decided by the inner house.

614. Mr. *Ewart*.] To what do you attribute the unwillingness of the inner house to give reasons for their judgment?—That arises from the old practice previously to the year 1825, when the Act was passed which we call the Judicature Act. The judges at that time made up their minds from written or printed pleadings; after 1825, the *viva voce* pleadings were introduced, and those judges in the inner house had never been accustomed to the hearing of causes in that new mode, and they had a predisposition to make up their minds from the short records, in the same way as they had done from the previous written pleadings.

615. Does that observation apply to more modern judges?—It applies more particularly to the older judges, who have never sat in the outer house, who have had no experience of *viva voce* pleadings as lords ordinary; there are three such judges at this moment.

616. Mr. *Wallace*.] You have stated that there are three judges in the inner house who have never sat in the outer house since 1825; will you be so good as to name them?—The Lord President, the Lord Justice Clerk, and Lord Gillies; they have never been accustomed to hear *viva voce* pleadings as lords ordinary, in the outer house, and from that circumstance they are predisposed to form their opinions upon the short records, as they did previously to the Judicature Act upon the long written pleadings.

617. Is it understood, that one or more of the judges you have named came into court with their judgments already written out, previously to the hearing of counsel on the causes?—They may be written out in some instances.

618. Is it not customary for the judges of the inner chamber to order what are called “cases”?—In cases of difficulty, such papers are ordered.

619. Will you explain what a “case” means?—A case means a written pleading prepared by the counsel in reference to the points on which the court wish further explanation.

620. Is what you have now termed a “case,” that which in the outer house would be conducted by *viva voce* proceedings?—A case is just a debate reduced to writing.

621. Sir *C. Grey*.] Is not a case resorted to after the argument, for the purpose of putting in a more succinct form the material points in the case?—Not in a more succinct form; it arises from this, that after the Lord Ordinary or the court has heard the pleading, probably he finds it a case of great importance and difficulty, and he would like to have the statement of counsel reduced to writing, that he may consider it deliberately; it is only in cases of great difficulty and importance that those cases are ordered; they are not at all frequent.

622. Mr. *Wallace*.] Are cases ordered at all by the judges of the outer chamber?—Sometimes.

623. In the outer or in the inner houses, are they most frequently required?—I would say in the inner houses.

624. Are not the inner houses chiefly courts of review?—Almost entirely.

625. Then, as courts of review, they are chiefly resorted to by the profession and by suitors?—Yes, in reference to all judgments from the lords ordinary they are courts of review; they have an original jurisdiction in reference to certain applications which are mere matters of form, in the shape of petitions, of applications for sequestrations, appointments of factors, and various things which are more of a formal nature than any thing else.

626. At what hour do the inner house meet?—At 11 o'clock.

627. Can you state to the Committee whether the hour of 11 has been resorted to by an act of sederunt or whether it is by statute?—I think it is recently fixed by statute; it was found very inconvenient, the sitting of the inner chamber together with the lords ordinary, and the hour was changed from 10 to 11.

628. Is it not the duty of the judges to frame rules of court, called acts of sederunt?—Yes, they are generally empowered under Act of Parliament to do so. In reference to the important change of 1825, they were authorized to make certain regulations, which were absolutely necessary.

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629. Are not the powers so conferred of a very extensive nature?—Yes, all that appears necessary to the judges, to carry into effect the Act of Parliament.

630. Do you mean to state, that under acts of sederunt the judges are empowered to make regulations for the most complete mode of working out the Act of Parliament?—Yes.

631. Are the judges in the habit of revising those acts of sederunt at the end of each session or each year?—I am not aware that they are.

632. The Parliamentary returns show that a great many questions arise on points of form, originating in rules of court under acts of sederunt; are you aware of that being the case?—Yes, it was given in evidence before the Law Commissioners, that since 1815, 1,300 cases were reported upon points of form; of course many more must have occurred that were not reported at all; those were cases that must have all gone to the inner chamber; they appear in the printed reports, and no case appears in the printed reports except of the inner house.

633. Is it not probable that a great many more cases of a similar kind have occurred since?—Yes; they are not so numerous of late.

634. Is it the practice of the judges to revise the rules which have led to those questions, so as to prevent the recurrence of litigation on the same grounds?—Not so frequently as they ought to do.

635. Would it not be a saving of the time of the judges, were they to adopt means for preventing that description of law suits coming before them?—I think so.

636. Would it not be exceedingly convenient to suitors and to their agents, if such a course was taken?—It would be most expedient.

637. It has been given in evidence here, and it appears by returns to Parliament, that the judges of the inner house are required to read an immense quantity of printed matter, and it is stated in a return made to the House of Commons, that nearly 14,000 quarto pages of such matter were given in to those judges in the last summer session; can you inform the Committee, assuming that statement as true, what proportion of those printed papers the judges may probably require to read and study?—I think a very small proportion, because a great proportion of those printed papers is composed of appendices, mere matters of reference, to which the counsel in *viva voce* debate refer; the judges are not called upon to read them, and I should think very seldom do so.

638. It appears by returns made to Parliament that the business of the Court of Session has very considerably decreased within the last 20 or 30 years; is it your opinion that those returns are well founded?—I suppose that they are correct; I know that there is a decrease.

639. Have not the Admiralty, Consistorial, Exchequer, Commissary and Jury Courts been merged in the Court of Session within these few years?—They have all been merged in the Court of Session except the Exchequer, the business of which is done by two of the judges of the Court of Session; and in regard to the Commissary there is part of the form of the confirmation of executors transferred to the Sheriff of Edinburgh; and in cases of divorce, the taking of proofs upon commission is devolved upon six sheriffs appointed for the purpose; that is by Act of Parliament.

640. Are not the causes formerly tried in the courts enumerated now tried in the Court of Session, or by judges belonging to that court?—Yes, except revenue cases, which are still tried in the Court of Exchequer by two of the judges of the Court of Session.

641. In spite of all these additions to the business of the Court of Session, it appears by the following table, which I am about to submit to you, that in the number of cases in the printed rolls of the outer house, the following reduction has taken place since 1793; the calculations in the table being made on a series of four years up to the years 1825, and since that, the number being given for specific years: that table exhibits not much more than one-half the number of causes in 1839 which were instituted in 1794; assuming that, in 1794, 15 judges were sufficient, with all the inconvenience of their sitting in one court, to decide 2,789 causes, as exhibited in that table, does it not appear to you by simple calculation that eight, or at most nine, judges ought to be sufficient to dispose of the present number of causes?—It does not follow that such a conclusion is correct; since 1825, by the *viva voce* pleadings which were introduced in the place of written pleadings, the lords ordinary have been generally overburdened with business, and



and if the judges of the inner house were to hear and decide cases in the same way, I think the business is sufficient to occupy the whole of their time

642. And therefore you are not of opinion that the present number of judges could be reduced if the business before them was properly conducted?—No.

643. Dr. Stock.] Do you mean by *viva voce* evidence the oral arguments of counsel or the taking of evidence and arguments?—I allude to the arguments of counsel.

644. Mr. Wallace.] Is there any such thing as witnesses appearing to give *viva voce* evidence before the Court of Session, except in a jury trial?—No, there is not.

645. Do you admit that table to be correct, so far as you are a judge of it?—I think it corresponds with any thing I have seen.

[The same was delivered in and read as follows:]

Year	-	-	-	-	-	1794	-	-	-	-	-	2,789
Average of four years preceding						1798	-	-	-	-	-	2,631
Ditto	-	-	-	-	-	1810	-	-	-	-	-	2,594
Ditto	-	-	-	-	-	after 1810	-	-	-	-	-	2,374
Ditto	-	-	-	-	-	preceding 1825	-	-	-	-	-	2,143
Ditto	-	-	-	-	-	after 1825	-	-	-	-	-	1,998
Year	-	-	-	-	-	1831	-	-	-	-	-	1,958
Ditto	-	-	-	-	-	1836	-	-	-	-	-	1,770
Ditto	-	-	-	-	-	1837	-	-	-	-	-	1,555
Ditto	-	-	-	-	-	1838	-	-	-	-	-	1,486
Ditto	-	-	-	-	-	1839	-	-	-	-	-	1,558

646. Has not the procedure before the Court of Session been simplified very much since 1794?—Very much improved and simplified.

647. Is not that a source of saving of time and labour to the judges?—Very considerable.

648. It appears by returns to Parliament of the number of causes brought before the Court of Session in the last three years, that in the year 1836–7 there were 1,770 causes enrolled for the first time before each lord ordinary, of which 546 were settled at once by decrees in absence, leaving 1,224 to be decided after hearing. In 1837–8, 1,555 causes were enrolled, of which 564 were settled by decrees in absence, leaving 990 for decision. In 1838–9, 1,486 causes were enrolled, of which 502 were settled by decrees in absence, leaving 984 for decision. And in the last year, namely, from January 1839 to January 1840, there were 1,558 causes enrolled for the first time before each lord ordinary, of which 563 causes were settled by decrees in absence, and 995 were to be decided after hearing. With these facts before you, do you not think that the business of the Court of Session is decreasing annually?—The business has been rather decreasing of late years, but last year, from the return made to Parliament, it is rather increasing.

649. During the period which I have mentioned is there a general decrease, or otherwise?—Yes, there has been a decrease, according to the statement contained in the query. I think it is perfectly correct.

650. Chairman.] You say there has been a decrease?—It has varied; I think there has been rather a decrease for several years.

651. Do you mean to say that it has varied in the year 1839 to 1840, 1838 to 1839, and 1837 to 1838?—Yes, it has varied as to the amount of causes brought into court.

652. I find from this table, that in 1837–8 there were 990 causes left for hearing; in 1838–9, 984 left for hearing; in 1839–40, 995 left for hearing. It does not appear from that that the business to be done before the court could have decreased to any extent?—No; it has varied a little, but there has not been any material change.

653. Mr. Wallace.] With this decrease of business before the outer houses, are you of opinion that a judge might be spared from that court?—I do not think so.

654. Have not important and difficult cases respecting freehold qualifications, cessiones bonorum, and sequestrations, in Scotland, ceased to come before the Court of Session almost entirely since the passing of the Reform Act, the passing of the Small Debts Act, and other recent statutes?—There has been a decrease of a considerable number of such cases.



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655. It has been stated before this Committee that suitors and agents are apt to select lords ordinary from a sort of caprice or an unaccountable something, rather than from their industry and talents; do you not, as a very experienced agent, conceive that the industry and talent of the lords ordinary are the real grounds for their being largely employed?—I should think it was industry and talent alone.

656. Mr. *Ewart.*] Is not one great advantage of *viva voce* pleading over written pleading, that in the case of *viva voce* pleading the counsel can correct any misapprehension of the judges, or offer any explanation, which he cannot do in the case of written pleadings?—It is a very great advantage.

657. Must not the exercise of such a power be satisfactory to the public, and conducive to the ends of justice?—I think so.

658. Do you consider that the vacations of the Scotch judges are too long, that they might be abridged with advantage to the public?—Probably they might; there has been of late an extension of the sittings; it has just come into operation; three weeks longer are devoted to the sittings of the lords ordinary.

659. Dr. *Stock.*] When did the change take place?—It commenced the 1st of November last.

660. Mr. *Ewart.*] You have stated the impediments to business which arose from the absence of counsel from the courts?—Yes, the withdrawing counsel from the lords ordinary to the inner house.

661. Have the senior counsel any right of making motions, exclusive of junior counsel?—They have no exclusive right; the senior counsel in general do not attend the motions, only the junior counsel.

662. There is no rule that certain motions can only be made by senior counsel?—There is no rule of the kind, either in the outer or the inner house.

663. Do you think that a material part of the business, which is now conducted by counsel, might, beneficially for the public, be conducted by the agents?—Certainly, all motions and undefended causes ought to be conducted before the clerks, and that would be a great matter of convenience and save the time of the lords ordinary; I should think some of the lords ordinary, probably upon an average, may be occupied an hour a day on mere motions, that might equally well be done by clerks.

664. That would relieve the counsel and the court?—Yes, it would relieve the Lord Ordinary, and give him more time in the hearing of causes, of which there has been such an arrear.

665. Mr. *Wallace.*] Is the opinion you have now expressed concurred in by a considerable number of gentlemen who were called before the Scotch Law Commission, of which you were secretary?—Yes.

666. Are those opinions contained in that report given by men of great experience, and largely employed in business?—Yes, they were selected on that account.

667. You have stated that there are five judges who sit in the outer house; how many days do they sit weekly?—Four days.

668. Then there are two entire week days upon which the lords ordinary do not sit?—Yes.

669. Is there any good reason why the lords ordinary should not sit upon each week day?—I am not aware of any; I think it would be a great improvement if the whole of the lords ordinary were to sit upon the Monday; it is a vacant court day altogether.

670. *Chairman.*] Could that improvement be effected by act of sederunt?—I rather think not.

671. It could be only by Act of Parliament?—Yes.

672. Mr. *Wallace.*] Are you sure of that?—I think so.

673. Can you refer to the Act which regulates their sittings?—I do not at present recollect.

674. Mr. *Horsman.*] Can you state whether the cause which originally led to Monday being the day upon which the lords ordinary did not sit, any longer exists?—It does not now exist; I believe the circumstance of Monday being a vacant day, arose from the old system that the judges had to read and study the written papers at home; and of course if Monday had been a court day they must have read them on Sunday.

675. Then in your opinion the same reason no longer exists for making Monday a vacant day?—No.

676. Mr. *Wallace.*] Have you stated all the various ways in which it has appeared to you, as secretary to the Law Commission, and as taken from the evidence

evidence brought before that Commission, that the lords ordinary could be relieved of extra-judicial duties?—I think I have.

677. You have stated, that an hour daily of the time of each lord ordinary is wasted in going through forms which you have alluded to?—I think so, upon the average.

678. That applies to all the courts?—To the lords ordinary.

679. Would the alteration which you have suggested, from the evidence of the witnesses before the Law Commissioners, and on your own authority, be conducive to the saving of expense, as well as delays in the court?—Yes.

680. Would those alterations prevent the obstruction to business which arises from absence of counsel?—To a very considerable extent.

681. Do the obstructions to which you have alluded very often create considerable inconvenience to the profession?—They do; they occasion very considerable delay and expense.

682. The inner houses of which you have spoken meet at the same hours, and have co-ordinate jurisdiction, have they not?—Yes.

683. Is that practice a convenient one?—It is attended with very considerable inconvenience; and I have mentioned the inconvenience in withdrawing the senior counsel from the lords ordinary to the advising of cases in the inner chamber.

684. You have informed the Committee that in your opinion the present number of judges is requisite to perform the duties of the Court of Session; suppose that one of the divisions of the inner house was abolished, the sittings prolonged, and the vacations shortened, can you form an estimate of how many months in the year it would be requisite for the judges to sit, supposing they were to meet at nine o'clock, as the lords ordinary do, and continue for the despatch of business until four o'clock daily?—I should think they would require to sit almost the whole year, if you reduce them to one chamber; I mean if cases are to be heard and decided in the way in which they are heard and decided before the lords ordinary; if they are to be considered and decided in the summary way in which they are at present, of course the period required would be much less.

685. Do you mean to state to the Committee, that if the present mode of conducting business in those courts is to be continued, one division of the inner house, by prolonged sittings, could not get through the business in a year?—It might; but it would not be nearly so satisfactory.

686. *Chairman.*] Do you mean the year, without any vacation or interruption?—Yes; if there were one chamber, it would require to sit almost the whole year.

687. *Mr. Wallace.*] How much short should you say of the whole year—It is very difficult to say.

688. *Sir W. Rae.*] And you say it would be much less satisfactory to the country?—Yes, the present sittings, with any extension that may be necessary, would be more satisfactory to the country than one chamber sitting on the whole year.

689. Will you assign the reason why you think that two chambers are more satisfactory than one?—Two are required for the business of the country.

690. Do you think the circumstance of a suitor having the opportunity of going to one or the other division, enters into that view of yours?—That is not of much importance.

691. *Mr. Wallace.*] Is not the business of the inner chamber limited by a daily roll of cases?—Yes.

692. When those are disposed of, in consequence of the absence of counsel, or any other cause, however early the hour may be, does not the court break up for the day?—It does.

693. Is not this a great waste of time, and a cause of expense and delay to the suitor?—It is.

694. Is it not one of the causes of the general dissatisfaction of the public to which you have alluded?—To some extent it is.

695. If there were but one chamber sitting daily, would the interruptions to business to which you have alluded occur?—It would be much the same, because if there was one chamber it would require to sit much longer, and it would interfere with the counsel, in taking them from the lords ordinary, nearly as much as at present.

696. The question is as to the interruption from absent counsel; would that be

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to the same extent as it now is in the two chambers?—Very much the same; I think the difference would not be much.

697. Has it been proposed to the Law Commission, by the profession, that the inner houses should sit on alternate days, instead of on the same days?—It may have been mentioned by individual witnesses, but it was not adopted by the Commission.

698. The *Lord Advocate*.] You will not undertake to recollect all the various proposals made to the Law Commission?—No.

699. Mr. *Wallace*.] Would the sitting of the courts on alternate days in any part prevent those interruptions to which you have alluded?—I do not think it would much.

700. It has been suggested that two courts of co-ordinate jurisdiction are more apt to give decisions without uniformity than one court would likely be; is that a point which has been considered by the profession?—I do not think there is much collision or inconvenience in that respect.

701. You do not think there is much want of uniformity?—No.

702. Is not one part of the duty of the judges to try jury causes?—Yes.

703. How is jury trial in civil causes relished in Scotland?—Not relished in any way; it is very unpopular; it was so at the commencement, and I should say it has increased.

704. Will you state the general reasons for this dissatisfaction with jury trial?—The very great expense, the uncertainty of the mode in which the case is conducted; and there is not much satisfaction in regard to the juries; sometimes there is a want of confidence in the jurors, and a want of discrimination in returning a satisfactory verdict.

705. Are juries found, so far as you know, to be incapable, or to give satisfaction in deciding criminal cases in Scotland?—In general they give satisfaction in criminal cases.

706. Did you ever hear it alleged that there was any want of a perfect power of discrimination in Scotch juries to decide criminal cases satisfactorily?—No, I have not.

707. Were not remedies proposed to the Scotch Law Commission for the improvement of jury trial in civil cases?—There was a good deal of evidence obtained upon the subject, but there was no report made.

708. Is that evidence recorded, so that it could be useful to this Committee?—The evidence has been reported to Her Majesty.

709. Have you ever heard of dissatisfaction being expressed by the profession at the mode of trying criminal cases in Scotland by jury?—No, I have not.

710. Is there much business before the Teind Court now?—Not much.

711. Do the judges, when they have disposed of the business before the Teind Court, proceed to any other business, or do they generally rise for the day?—They generally rise for the day.

712. Is there any good reason why they should not proceed with the general business of the court so soon as that of the teinds is settled?—I am not aware of any.

713. *Chairman*.] Supposing it to be expedient to make such an arrangement, could that be done by an act of sederunt of the judges, or must it be done by an Act of Parliament?—It might be done by the judges, I should think.

714. Mr. *Wallace*.] Do they occasionally proceed to other business after the teind business has been done?—On the teind days the lords ordinary sit in the outer house, but the judges of the inner house do not generally proceed to other business after disposing of the teind business.

715. From the mass of evidence which has been given before the Law Commission, of which you were secretary, and from your own observation as a professional man, I wish to ask you if it would be better for Scotland that jury trial in civil cases should be denied to the people altogether, rather than proceed in its present form?—I think so, and I believe it is the general opinion.

716. Sir *C. Grey*.] When the jury trial in civil cases was introduced into Scotland, was there any alteration made as to the form of pleading in bringing cases before a jury, that is, in preparing the record?—There was no alteration made in 1815, in reference to the mode of preparing the record; the old system of preparing the statement of the case went on till 1825, when the Judicature Act was passed, and then a material change took place.

717. Sir

717. *Sir W. Rae.*] Were there issues prepared?—Yes.

718. *The Lord Advocate.*] Originally when the Jury Court was instituted, were questions sent to the jury to be tried upon the issues sent from the court?—Yes.

719. Afterwards, certain cases went to the Jury Court entirely?—Yes.

720. Some of those cases were enumerated in the Act of Parliament?—They were.

721. And the enumeration was successively enlarged?—Yes.

722. In those cases which were directed by the Act to be tried in the Jury Court, the proceeding by making up the record was the same in the Jury Court as in the Court of Session, till the record was completed?—Yes.

723. And then from the completed record there is an issue framed by the issue clerks, or the parties, at the sight of the jury clerks, adjusted by the court, and the trial takes place upon that issue?—Yes.

724. *Mr. Wallace.*] Can you recollect when the jury trial in civil causes was first introduced into Scotland?—It was first introduced in 1815.

725. Do you adhere to your opinion that in spite of the changes which have been made upon it, still it is so obnoxious to the people that in your opinion and in that of those whom you have heard speak of it, they had better be deprived of it than have it in its present shape?—I think a general opinion exists to that effect.

726. *Mr. Serjeant Jackson.*] Why does that feeling exist?—Jury trial never was popular; the general feeling of the people was against it.

727. It was disliked as being an innovation in the established system rather than from any vice in the institution?—It has never given satisfaction.

728. Is the quality and station of life of the jurors who sit in criminal cases the same as that of the jurors who are empanelled in civil cases?—I believe they are the same, except where there are special jurors selected for any particular case.

729. Then it is not by reason of want of ability in the jurors that the public in Scotland are dissatisfied with jury trial in civil cases, but rather because it is an innovation upon their old established institution?—The suitors and the profession have not much confidence in the juries that try civil cases.

730. Then they have more confidence in the judges of the land than they have in the juries?—They have.

731. The judges of Scotland, in deciding questions of fact, have hitherto given satisfaction to the people of Scotland?—Not in the mode of trying and deciding cases; that is one of the great grounds of complaint at the present moment in reference to the inner chamber, as I have already explained.

732. Are not those questions that are referred to juries merely issues of fact?—They are.

733. Then the people of Scotland are better satisfied with the opinion of the judges upon matters of fact than with the opinion of juries?—There is a very considerable feeling in favour of the judges in that respect.

734. *The Lord Advocate.*] But the dissatisfaction with jury trial arises from a feeling in favour of the old system?—Yes.

735. *Mr. Horsman.*] Is not the expense one cause?—The expense is one ingredient.

736. *Sir C. Grey.*] In the issues that are made up for the jury, do you know whether the same rules are observed as under the English system of pleading with respect to the issue being confined to matter of fact, and each issue confined to one point?—I am not acquainted with the English practice.

737. You said that there was perfect satisfaction with the jury system in criminal cases, and that the objection was only to civil; do not you think that may arise from the issues not being so simple and confined to matter of fact in civil cases as they are in criminal?—I do not think it depends upon the issue.

738. *Sir W. Rae.*] Did that dissatisfaction originate from the first commencement of jury trial in Scotland?—Yes.

739. And it has continued all along?—Yes.

740. Who presided in jury trials for many years after the introduction of the jury system?—Chief Commissioner Adam.

741. An English counsel acquainted with English practice?—Yes.

742. *Mr. Wallace.*] Have the people ever had a cheap and simple mode of trying civil causes by jury similar to the cheap and simple mode of trying criminal

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cases before a jury?—It is a very expensive and intricate mode of proceeding before a jury; there is no cheap and simple mode provided.

743. Does it consist with your knowledge or the information communicated to you as secretary to the Scotch Law Commission, that great dissatisfaction exists in the towns of Glasgow, Paisley, Perth, Dundee and Aberdeen, amongst the law profession generally, with the mode of procedure in the Court of Session?—The evidence referred to related chiefly to the Sheriff Courts.

744. Do you believe that gentlemen in the profession of advocates, entertaining the same opinions as you have expressed here to-day, would be willing to state those opinions before this Committee?—I cannot answer that question.

745. *The Lord Advocate.*] You presume that the members of the bar, when called upon to give evidence, will give their evidence according to the truth?—I do.

746. *Mr. Wallace.*] Do you believe that gentlemen of the bar from Edinburgh, who entertain the same opinions as you do, could express those opinions with safety to their professional interest?—I should think so; I do not apprehend any risk in that respect.

747. *Mr. Serjeant Jackson.*] Do you think that there is any class of persons in Scotland, who are more competent to give information to the Committee of the working of the courts of Scotland, than the gentlemen of the profession?—I should think the bar are just as competent to give evidence as any persons.

748. Are they not, from their professional habits and their constant attendance upon the court, the class of men most competent to give an opinion?—Very competent to give an opinion, but they do not know the inconvenience that arises in the course of practice so much as the solicitors do.

749. *Chairman.*] Has it ever been proposed in Scotland, to make such a division of counsel as Mr. Wallace has alluded to?—I am not aware that it has ever been proposed.

750. Do you think that it would be fair to the advocates practising before the Supreme Courts, that they should by any such arrangement be deprived of the power of practising generally before any one of the courts that might suit their convenience?—Such an arrangement might be complained of, but I think there would be a great advantage to suitors from counsel being attached to each division of the court.

751. You have stated that you consider it would be an advantage, but would you consider such an arrangement fair, in a professional point of view, to the advocates who practice before the Supreme Court; would it be doing them justice to restrict their practising before any one of the two divisions?—I do not see much objection to it; the interest of suitors must be looked to.

752. *Mr. Serjeant Jackson.*] Is there sufficient business in the courts of Scotland to make it worth the while for any gentleman of eminence to pursue the profession if they were confined to one court?—That is the chief objection.

753. Is there a sufficient quantity of business, in your judgment, to make it worth the while for men of eminence in the profession to pursue that profession, if they were circumscribed to one court?—Perhaps not.

754. *Chairman.*] You have stated that great dissatisfaction arises from the short manner in which causes are heard in the inner house than in the outer house; is it your opinion that the Act of 1825, the Judicature Act, if carried out in its full spirit, would tend in a considerable degree to remove that dissatisfaction?—I think it would; it is one of the great disadvantages to the fair operation of that Act, the circumstance of the older judges in the inner house not having had the experience of hearing *viva voce* pleadings in the outer house, and from having been accustomed to make up their opinions upon the written pleadings, they are very apt to do so upon the short records and to hear as little from counsel as possible.

755. Then this is an evil which is working its own remedy gradually every year?—Yes.

756. And when oral pleadings come to be more generally adopted in the inner house, will it not follow, as a matter of certainty, that the judges will sit longer and give more time to the public in public, than they do at present?—Yes.

757. Is it your opinion generally, that the business before the inner divisions of the Court of Session is such, that the number of judges in either of the divisions might be reduced?—I do not think they could be reduced.

758. Is

758. Is it your opinion that any of the judges in the outer house could be dispensed with?—I do not think so.

759. Independently of the quantity of business brought before the two divisions, and with reference to their numbers, do you consider the number four, to have any specific advantage attached to it?—I certainly do; it is the best number for an inner chamber.

760. Will you state to the Committee why you think the number four to be the most expedient number of which each division should consist?—It forms the best quorum; take the case of the judges differing in opinion, in many cases you would have three to one.

761. You have stated that it appeared in evidence before the Law Commission that the legal profession in Glasgow, Aberdeen, Dundee, Perth and Paisley were dissatisfied with the practice before the Supreme Court in Edinburgh; why were they so dissatisfied with that practice?—They were dissatisfied partly on account of the expense and delay in the hearing of cases before the outer house, but chiefly on account of the mode in which cases were heard and decided in the inner house.

762. Then their dissatisfaction partook generally of that which you have before alluded to as felt by the public at large?—Yes.

763. Sir *W. Rae*.] Did any part of the remedy consist in opening the local courts more fully than at present?—Yes, that has been a great improvement.

764. Did those persons who applied from those towns point to that as one of the remedies?—Yes, they wished for the extension of the sheriff's jurisdiction, which has since taken place.

765. Dr. *Lushington*.] You state that there is delay in getting causes heard before the lords ordinary; will you state the cause of that delay?—That delay arises chiefly from the senior counsel being called into the inner house, whereby the debate is heard piecemeal, and put off from day to day; that is one of the principal causes.

766. Are there any other causes?—That is the chief cause; I am not aware of any other.

767. You have stated that you think the time of the lords ordinary may be in some degree saved by the motions of form and so on being disposed of by other persons; can you point out to this Committee any thing else that can be done to save the time of the lords ordinary, which would not require an Act of Parliament?—I think that those which I have mentioned embrace the whole, except the preparation of records, which are at present superintended by the lords ordinary; and might be withdrawn from them, and left to the counsel for the parties.

768. Have the goodness to state what you particularly advert to by the words "preparation of the record"?—The Lord Ordinary, after the record is made up, considers the whole of it, to see if it is prepared according to certain rules and regulations; a good deal of time is wasted in that way, which might be saved by leaving that entirely to the counsel; it is no part of the proper functions of judges to superintend the preparing of records; and though it might have been necessary immediately after 1825 when the new system commenced, I do not think it is at all required now; that would save a great deal of the time of the lords ordinary.

769. The first proceeding will be the summons; is there any of the time of the Lord Ordinary occupied in regard to the summons alone which can be saved?—No.

770. The next proceedings are the defences; is there any time of the Lord Ordinary occupied with reference to the defences which could be saved?—No, none.

771. Does it not sometimes happen that the Lord Ordinary decides a cause upon the summons and defences?—Very seldom.

772. Sometimes it does happen?—It may happen sometimes.

773. That must be the act of a judge, must it not?—The parties must concur.

774. Then the next step in the cause is the condescendence?—It is.

775. How is the time of the Lord Ordinary occupied with regard to the condescendence?—He pronounces an order for it in the first instance; then answers are made to that condescendence; then those papers are generally revised, sometimes more than once; after all that is gone through the judge takes those papers into consideration, to see if they are free from objection, and that no irrelevant matter has been introduced; and then the record is closed.

776. Then the Lord Ordinary considers the whole condescendence and answers, and if there happens to be a statement of facts on the one side and an answer to that,

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that, he takes those papers home, considers them, and rejects any superfluous matter?—He always takes the papers home to consider them; sometimes there may be irrelevant matter rejected.

777. But is it often that irrelevant matter is rejected?—I do not think it is very frequent.

778. What time of the Lord Ordinary is occupied in revising the condescendence and answers?—It is considerable, but those papers are perused by the judge out of court.

779. For what purpose does he peruse them?—To see that the record is framed according to the Judicature Act.

780. Do you think it could be left safely to counsel to frame the condescendence or answers, without any judge revising them and making up the record?—I think so; I think the judge in general does not touch the mode in which the record is framed by counsel, though he goes through all those papers in perusing the record; it is very seldom that much alteration is made.

781. If anything is altered it must be done by a judge, and can be done by nobody else?—That is the present practice.

782. If there was no judge to superintend the making up of this record, would it not be probable that irrelevant matters would creep into it, and so lengthen the proceedings?—Not to any great extent; I think the counsel are so much accustomed to the framing of those records in a correct shape, that that would not arise.

783. Then, in point of fact, the only time of the judge that could be saved is the reading over the condescendence and answers, in order to see whether there is any extraneous matter?—Yes.

784. Can you state that any time can be saved, beyond that occupied by the judge in examining the condescendence and answers; that is, the statement of the facts and the answers to them, for the purpose of seeing whether there is any irrelevant matter?—No, none.

785. Would that be a very material saving of time?—Very considerable.

786. Must not the judge read all those papers before he decides the case, after having the whole record made up?—He may not peruse the papers till he hears counsel upon them; the first reading, to see whether the record is correctly made up, would be saved.

787. Then do you proceed upon this assumption, that the judge, having read the papers, in order to see that the record is properly prepared, that that completely escapes his memory, and that he must have those papers again?—The preparing of the case may be at such a distance of time before the case comes to be heard, that he does not recollect anything of it; it may be the distance of a year.

788. Do you presume that the Lord Ordinary does not make his notes of what are the points to be decided in the case, with reference to the time when the cause is to be heard before him?—I do not think so.

789. When the record is made up, then the Lord Ordinary decides the case upon that record?—After the *viva voce* pleading.

790. You have stated that the Lord Ordinary generally appends to his decree, a note of his reasons; do you consider that to be a practice useful or otherwise?—I consider it to be very useful.

791. You have stated, that two-fifths of the judgments of the lords ordinary have been acquiesced in?—Yes.

792. Do you not believe that the circumstance of the notes, containing the reasons of the lords ordinary for that judgment, his references to authorities and to the law, very frequently prevent a reclaiming note to the inner house?—Certainly.

793. You have stated, in answer to a question put to you by Mr. Wallace, that with respect to the large mass of papers which the judges were said to take home for the purpose of reading, only a small portion need be read, and you referred especially to the appendixes; have the goodness to state, with the exception of what you particularly referred to, namely, multifarious accounts, what those appendixes generally consist of?—They consist of written documents, which are founded on in the course of the case.

794. For instance, deeds of entail?—Yes; various deeds.

795. Various



795. Various documents, such as correspondence and exhibits?—Yes.

796. How is the judge to prepare himself to decide the case, unless he reads all those documents?—From the pleadings of counsel, the *viva voce* debate.

797. Would any judge be justified in giving an opinion upon a written instrument, upon the *viva voce* pleading of any counsel, without having read it from one end to the other?—In the outer house the judge hears counsel in the first instance upon the record, and very seldom gives judgment immediately after the pleading is concluded; he takes his notes in the debate, and then he peruses the record with his notes, and gives judgment subsequently.

798. But if the inner house was about to hear a case of entail, and a long deed of entail was in the appendix, as it ought to be, would it not be necessary, even previous to the *viva voce* pleading by counsel, that the judge should peruse that deed of entail?—I do not think it would be necessary previous to the hearing of counsel; he has all the important parts of it pointed out by counsel in the course of the debate; and that mode of proceeding was recommended by the Law Commission, that the judge should not peruse the record previous to the hearing, because it left an impression on the mind of the judge.

799. Is it the duty of a judge to take the contents of a written instrument from the mere statement of counsel?—He has the instrument before him.

800. Do not you think he would be better able to understand the argument of counsel, if he had read the deed or written instrument beforehand?—It may be an advantage to read it beforehand; but I do not consider that it is necessary, when counsel are to point out the important parts of it; and if it is a case of difficulty, it is afterwards considered, with the advantage of the oral pleading.

801. You have stated that, in your opinion, the business would be sufficient to occupy the whole time of the two divisions, if the cases were properly heard; upon the supposition that there was only one court, would there not be considerable inconvenience if that court should be divided in opinion?—There might. One of the lords ordinary would have to be called in.

802. Supposing a question of great difficulty arises, it is customary now to have the opinion of the consulted judges?—Yes.

803. A great part of that benefit would be lost by the reduction of the number of judges, would it not?—Yes.

804. Then you do not think it advisable to reduce the number of judges?—Certainly not.

805. In your judgment and belief, would it be very unfavourably received in Scotland if that number were to be reduced?—I should think so.

806. Looking at all you know upon the subject, and considering it fairly, do not you believe that there is reasonable and fair occupation for the 13 judges administering the law according to its present course in Scotland?—I think there is.

807. With respect to the increase or decrease of business, is it possible to form a judgment of the time to be occupied, simply from the number of causes?—Not very correctly.

808. May not some causes arise in some years, of very great doubt and difficulty, that occupy considerable time in discussion?—Yes.

809. Some great question of feudal law, where the judges are divided in opinion?—Yes.

810. And therefore, in fact, sometimes the labour of the judges may be as severe, in years where there are fewer causes, as in other years where the causes are more in number?—It may be so.

811. Am I not right in my conception that the system of jury trial in civil causes has at all times and periods been unacceptable generally to the people of Scotland?—It has.

812. From their own peculiar habits, notions and ideas, they are not so well satisfied with jury trials as they are with another mode of investigating the truth?—They are not.

813. Sir C. Grey.] In criminal cases the jury trial is always held in the neighbourhood of the place where the offence is committed, is it not?—Except in those cases tried before the High Court in Edinburgh.

814. Are those only the exception, not the rule?—A great proportion are tried in Edinburgh.

815. Is it a frequent practice to bring the witnesses in criminal cases from the Highlands, for instance, up to Edinburgh?—Yes, in cases before the High Court it must be so.

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816. That is different from the practice in England?—Yes, I believe so.

817. Do not you think it might tend to reconcile the people of Scotland to jury trial, if both in civil and criminal cases the trial were held in the neighbourhood of the place where the subject of inquiry had arisen, the witnesses being upon the spot, and the jurors coming from the neighbourhood?—It might be an advantage.

818. Sir *W. Rae*.] Might there not be inconveniences from this circumstance, that there might be prejudices connected with the neighbourhood which might render it unadvisable to try the cases in that mode?—In some cases there might.

819. You are aware that those prejudices are strong in the Highlands and other parts of the country?—I am.

820. Is there not a facility in bringing witnesses to Edinburgh by means of steam?—There is.

821. Is it not found that carrying counsel to a distance is often more expensive than bringing witnesses to Edinburgh?—It is.

822. Therefore, perhaps, you cannot say that the expense would be greater upon the whole?—I do not think it would.

823. Sir *C. Grey*.] Would not the expense be obviated if the practice existed of trying civil causes at the same time as criminal causes, as is done in England?—Very few of the counsel that appear in those jury trials go upon the circuit except on special retainers.

824. Would not they go if the civil causes were tried in that way?—They would not go unless they were specially retained.

825. Sir *W. Rae*.] Unless the number of causes were greater than at present?—Precisely.

826. The *Lord Advocate*.] In point of fact, there are scarcely any civil cases; the circuits are for criminal business?—Yes.

827. You have stated that there is a general indisposition among the Scotch people to try their causes by jury?—There is.

828. You do not refer that to any thing particular in the classes from which the jurors are taken, or any thing particular in the composition of the juries?—No, I do not.

829. Jury trial for civil causes was totally unknown till 1815, and the institution, from a variety of causes, has proved very far from being popular in Scotland?—Very far.

830. So that in spite of all the legislative enactments that have been made, the jury trial has not yet got into ordinary practice as part of the common administration of justice in the country?—It has not.

831. Dr. *Lushington*.] Do not you think it would be very injudicious to compel the people of Scotland by legislative enactment to adopt jury trial?—I think it would.

832. Mr. *Horsman*.] You stated that the two divisions of the inner house do not sit at all on Monday; Saturday also is a short day, is it not?—Yes.

833. So that they sit in fact four days in a week?—Yes.

834. During those four days in the week, I see by a return to the House of Commons made last year, the time of sitting of the first division is stated to have averaged something under three hours a day, and the second division two hours a day; is that about the time that is occupied generally?—I should think it is.

835. The short sittings in open court were originally established upon the ground of the quantity of papers the judges had to read?—I believe so.

836. But you have stated that that has been very much diminished by the Act of Judicature of 1825?—I have.

837. To what extent should you say that the written pleadings are diminished; to the extent of one-half?—I should think one-half.

838. Have the sittings in open court been at all increased since the time that the use of written papers has diminished?—I do not think they have.

839. You have stated that there is great dissatisfaction felt at the manner in which cases are heard and decided in the inner houses?—Yes.

840. And that that dissatisfaction is very general?—Perhaps the Committee will allow me to refer to some of the evidence that was given upon that subject before the Law Commission; there is the evidence of the Dean of Faculty very strong upon the subject. I beg also to refer to the evidence of Mr. Daniel Fisher, a solicitor in extensive practice before the court, in the Second Report page 16—[*the Witness read the Evidence*]; these extracts express my own opinion at this moment, and I consider they express the opinion of the profession and the public.

841. The

841. *The Lord Advocate.*] Would you now, if you were called upon to express your opinion at length, express it in terms of the same import with those which you have read from the evidence of Mr. Fisher?—I would. The evidence of the Dean of Faculty is referred to in the First Report, page 42. I would wish to bring under the notice of the Committee the opinion given by the Law Commission to the same effect. It is thus stated, at page 42 of the First Report: “We most fully concur in the conclusions of this opinion, as well as in the reasonings and grounds upon which it is formed. We have further to state, that the opinions of the professional persons whom we have examined, including all those who have had the best opportunities of observation of the proceedings ever since *vidē voce* pleadings were introduced, are unanimous and clear, and entirely in unison with those which we have ourselves formed, from the result of our own experience and observation. The feeling is universal, that in order to give fair effect to the regulations in regard to the record, to restore the confidence of the country in the judgments pronounced by the Court of Review, and to relieve the judges themselves from acting under a system so much at variance with the important and indispensable objects of a patient hearing and full consideration of the cases, it is necessary that some means should be resorted to for remedying this evil; the remedy suggested in the abstract which we have given from the evidence of the Dean of Faculty appears to us to be the best that can be resorted to. We are of opinion, that cases ought to be heard in the inner house without any previous perusal of the record, farther than perhaps an inspection of the summons and defences, and that after cases are so heard, the delivery of the judgment should be postponed till the following or such other day as the court may deem it to be necessary, for the object of full consideration of the argument and record together. We are persuaded that this would be a great and advantageous change in the course of procedure, and that judgments thus pronounced would tend materially to diminish the number of appeals to the House of Lords, which we have reason to know have often been resorted to from an impression on the minds of the parties, that the judgments, though not perhaps erroneous, had not been pronounced with due consideration.”

842. *Mr. Horsman.*] With the judges sitting the number of days they do in a year, and the number of hours each day which we have in this return, the one division sitting three hours and the other two hours a day, is it possible for them to get through the cases, giving such a hearing of the cases as they ought to give?—It would require them to sit much longer if they heard the cases in the way that they should be heard, as pointed out by the Law Commission; in place of sitting two hours a day, they ought to sit four or five, in order to hear counsel, if required.

843. You have stated that the judges come into court ready to give judgment upon reading the record, without hearing counsel at all?—Very frequently.

844. Is it possible for a judge to know the merits of a case from reading the record?—Rather imperfectly; there is simply a statement of the facts, without any argument or pleading.

845. *Sir W. Rae.*] You say that the judges do not sit on Monday; is there no duty done on Monday?—The Court of Justiciary sits occasionally; I cannot say the number of sittings.

846. When a cause comes into court upon a reclaiming note, are the counsel who are against the judgment heard first; is that the practice?—Yes.

847. Are they much interrupted in that part of the proceeding, in stating their objections to the judgment?—Not much interrupted; senior counsel is generally heard.

848. Supposing the court to be satisfied, upon hearing the counsel against the judgment, that they have not made out any case, do you think it necessary that they should sit and hear counsel on the other side?—That is a special case; I think, for the satisfaction of the parties, that a full hearing on both sides is generally required.

849. Having heard the whole upon one side, and affirming the Lord Ordinary's judgment, would not that satisfy them?—If the case was fully heard and considered.

850. Are you aware that the House of Lords, having heard counsel for the appellant, sometimes stop the counsel, without hearing any more of the case?—I am aware that such is the case.

851. Does that occasion dissatisfaction?—I am not aware that it does.

852. *Mr. Horsman.*] In the system which now exists, of the judges perusing the cases at home before they come into court, does it not put it to the option of

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any judge either to read those papers or not, as he pleases, before he comes into court?—It may.

853. And if he should not look into those papers, it is a difficult thing for that to be discovered?—It certainly is, but I would not blame the judge for not reading the record previously to the hearing of counsel, if counsel were sufficiently heard afterwards.

854. Is it not considered that the judge has a great deal of time when he is not in court, and which is given him expressly that he may read the records out of court?—Yes.

855. What is the opinion among the public and the profession, as to the manner in which the system operates, of so much of the work being done out of court?—The impression is not very favourable.

856. From your own experience, should you say that evidence appeared of the judges coming into court without having prepared themselves upon their cases, as it was understood they ought to do?—I cannot speak positively upon that.

857. *Sir W. Rae.*] You think it an advantage that the judges should not be so fully prepared when they come into court?—Yes; it is apt to produce impatience in the hearing of counsel.

858. *Mr. Horsman.*] Does any part of the dissatisfaction which you have stated exist, as to the manner in which those cases are disposed of, arise from an impression that the judges do not come into court prepared as they should be?—Perhaps it may.

859. Have you any doubt about that?—There may be difference of opinion as to this.

860. *Sir W. Rae.*] Then is not the judge placed in the unhappy position, that one party thinks that he ought not to read the record, and the other party thinks that it is his duty to do so?—I think all that would be fully removed if counsel were fully heard in open court.

861. *Mr. Horsman.*] I am asking you of the dissatisfaction which exists to the mode in which cases are decided; does any part of that arise from an impression that the judges do not understand the cases as they ought to do?—It certainly does, and I could refer to evidence before the Law Commission, where such an opinion is expressed.

862. In your opinion, is that dissatisfaction well founded; have they good grounds for it?—To some extent.

863. Does that impression create any part of the distrust which you have stated exists of the decisions of the court?—It does.

864. Your remedy for the dissatisfaction which prevails in Scotland, would be to have longer sittings and longer hearings in the court?—Undoubtedly.

865. *Mr. Wallace.*] Coupled with that, a different arrangement of the mode in which counsel attend the court?—That would be a great improvement.

866. You have been asked whether you think it would be unfair to the counsel to restrict them to particular courts; is it not unfair to the suitors to cause their business to be postponed and put off for weeks, and perhaps months, for want of a better arrangement of counsel?—It is.

867. *Sir W. Rae.*] Does not that arise from the eminence of the counsel?—Partly.

868. *Mr. Wallace.*] Does it not arise from the present system?—Yes.

869. *Sir W. Rae.*] What do you mean by the present system, as applicable to that answer?—The mode in which counsel are withdrawn from the debates going on in the outer house to the inner house, and the way in which counsel are sometimes employed in one court when a case comes on in the other division at the same time; very considerable interruption and inconvenience arise from those cases being brought on at the same moment.

870. Must not that occur in every country with men of eminence, where more than one court meets at the same time?—Yes; but in England I believe there is a bar attached to each court.

871. *Mr. Serjeant Jackson.*] Is it possible that the non-attendance of counsel in those cases can cause delay for months?—Not so long as months.

872. Does it produce the delay of weeks?—It may; it depends very much upon circumstances; if it is towards the end of the sittings, then a cause must be put off to the next session.

873. Then it is only when an interruption of that kind occurs towards the close of the session that those delays occur?—Those delays go on in the ordinary sittings.

874. Would

874. Would they exceed more than a day or two in ordinary cases, at the beginning of a session?—The delay might be several days.

875. You stated in answer to the chairman, that in your judgment the constitution of a court consisting of four members was the most desirable, because in cases of difference there would be three to one; how would it be in case there were two and two?—If they were divided two and two, another judge is called from the outer house; that is provided by Act of Parliament.

876. Then you are always sure of having a decision?—Yes; it is provided by Act of Parliament that one lord ordinary should go into the division where the difference occurs.

877. You have stated it as a ground of dissatisfaction in the mind of the public with the decisions of the Scottish courts that the judges come into the court having too carefully examined the records, and having their minds made up upon the subject; did I rightly understand you?—My statement had reference to the mode of hearing the case.

878. The information of the judges who come thus prepared into the court, arises from a careful perusal of the record: how is that record constructed;—is it first prepared by counsel on both sides?—It is.

879. Is it then examined by the judges to see that it correctly states the subject-matter of the suit, and does not contain irrelevant or impertinent matter?—It is.

880. Then by those means it is tolerably well insured that the record shall present to the minds of the judges a true statement of the subject-matter of litigation between the parties?—Yes, the simple facts of the case.

881. Disembarrassed of all argumentation upon the subject?—Yes.

882. Do you really conceive that a judge who has made himself master of the actual substance of the case in litigation between the parties is in a worse position for receiving assistance from the discussion by counsel afterwards, than if he came into court with his mind a perfect blank on the subject-matter?—He is not in a worse position, but he may be more unwilling to hear counsel.

883. Do not you conceive that he is in a far better condition to understand the argument of counsel on one side and the other?—He may; but it has been complained of as creating an impression on the mind of the judge previous to the hearing of counsel.

884. Does it not strike your mind as being a most unreasonable ground of complaint?—There would be no complaint, but the reverse, if the hearing of counsel *vivâ voce* took place afterwards.

885. Is there not a *vivâ voce* hearing of counsel afterwards?—It is much shorter, from the circumstance of the judge having made up his mind upon those pleadings.

886. Is it not shortened because the judge is prepared to see what is the real point in the case that ought to be discussed, and the point in the case that does not require discussion?—Yes; but this is not what the Judicature Act contemplated.

887. If a man be conscious that he is right in the subject of his suit, would not such a man conceive it to be an advantage that a judge should have thoroughly informed his own mind as to what were the real merits of the question pending between the parties?—Yes.

888. Then the party who was conscious he was wrong would be rather dissatisfied that the judge should know too well what the case was?—It is necessary that the parties should be satisfied, from what takes place in court, that his case has been properly understood.

889. Then the dissatisfied part of the public are the unsuccessful suitors?—That might be so in particular instances.

890. Mr. *Harsman*.] Are the public dissatisfied with the judges preparing themselves upon the case before the hearing, or is it, that having prepared themselves beforehand, it makes them impatient in hearing the *vivâ voce* pleading?—It is not their perusing the record which occasions dissatisfaction, but it is that perusing of the record makes them more impatient in hearing counsel afterwards.

891. They come into court with their minds made up upon the record, and will not hear the counsel upon it?—That is the complaint.

892. That dissatisfaction exists very generally among the profession?—It does; but it is not from the judge reading the record, further than that as it creates an impatience in hearing the counsel afterwards.

893. Dr. *Lushington*.] And it is supposed, in some cases, that the judge neither reads nor hears?—I do not say so.

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894. Dr. Stock.] Can you state the particular division of the court in which that impatience exists more particularly?—I cannot make any distinction.

895. Mr. Wallace.] It has been inquired of you by Dr. Lushington, whether or not the steps of procedure before the lords ordinary were of that nature, that by being committed to other hands, the business of the court would be better and more expeditiously done; has any question put to you by Dr. Lushington changed your opinion with regard to the procedure in those courts which you stated previously to this Committee?—It has not.

Mr. James Johnston Darling called in; and Examined.

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896. WHAT is your profession?—Writer to the signet.

897. How long have you practised as writer to the signet?—Since 1824.

898. Have you been in any extent of practice before the Supreme Courts?—Considerable practice.

899. Have you published or written any work upon the practice before those courts?—I have published two works; one on the practice of the Court of Session, and the other directions to the officers of the law for executing their duties, both civil and criminal.

900. Are you thoroughly acquainted with the mode of conducting business both before the outer house and the inner house?—Yes; I think I am.

901. Mr. Wallace.] Is the work upon the practice of the courts, which you have published, considered at this time the best reference by the profession?—It is the last published book, and I believe it is so considered.

902. Has the business of the Court of Session been diminishing or increasing of late years?—Diminishing.

903. Have several branches of business been removed from that court?—Yes, several very important branches, particularly that regarding freehold qualifications, or the right of voting under the old system, those questions occupied a great deal of the time of the court.

904. Those were questions of feudal law?—Yes, difficult questions of feudal law and conveyancing constantly arose.

905. Are there any other branches of business, that, in consequence of the late Acts of Parliament, have chiefly left the Court of Session and been transferred to the Sheriff's Court?—Sequestrations; the greater part of that business has been removed from the Court of Session to the sheriff.

906. Any other?—The process of cessio bonorum of bankrupt debtors has been removed almost entirely to the Sheriff's Court.

907. Has the institution of the Small Debt Courts and Circuits Small Debt Courts had any influence upon the business of the Court of Session?—I believe it has lessened the business of the court to some extent; though there were not many cases of sums under 8*l.* 6*s.* 8*d.* brought before the court, still there were some occasionally.

908. Sir W. Rae.] Could any case under 12*l.* sterling come into the Court of Session?—Yes; it might come by suspension or reduction.

909. Mr. Wallace.] Have you any statement to produce to show the decrease of business in the Court of Session?—Yes, I have prepared a statement showing that the business of the Court of Session has been rapidly decreasing since the year 1794.

910. Chairman.] Have you prepared that statement purposely for this Committee?—I have.

911. Mr. Wallace.] From what documents have you prepared it?—From Parliamentary returns made by the court.

912. Be so good as to read it?—[*The Witness read the same.*—Vide Appendix (A.)]

913. Do the lords ordinary meet on the 20th of October under the new Act?—No, they meet on the 1st of November.

914. To what causes do you attribute the decrease of law suits, seeing that the general business and population of the country have increased so much within the last 20 or 30 years?—I attribute it in a great measure to there being less spirit of litigation in the country than formerly; to the decrease of the business of the inferior courts, and in a great measure to the expense and delay of proceedings in the Court of Session, and the public dissatisfaction with the manner in which these proceedings are conducted.

915. Sir W. Rae.] Does the fact of there being a decrease of business in the inferior

inferior courts consist with your knowledge?—Not with my knowledge, but with the information I have received from practitioners in those courts; I do not practise in the inferior courts myself, so that I do not know it of my own knowledge.

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916. Mr. Wallace.] You have stated your opinion that one cause of decrease arises from the circumstance that the spirit of litigation has decreased; to what do you attribute that?—To the increasing intelligence of the public, and better education.

917. What is the great cause of delay in the Court of Session?—The great cause of delay is the long vacation; the court sits only a very short time during the whole year.

918. How many days in the year do the inner houses sit?—One hundred and fourteen.

919. Can you state to the Committee how many days the lords ordinary sat before the Act of last year, by which the salary of the judges was raised?—They sat from 90 to 95 days.

920. Does that appear by the returns?—No, it does not; but it is easily calculated from the almanack.

921. Chairman.] What do you mean by 90 to 95 days; do you mean to say that when they sit only a portion of the day, you reckon that as a whole day?—Whenever they ought to sit in the court at all, I count it a day whether they sit or not, and however short the sitting may be.

922. Mr. Wallace.] How many days were added to their sittings under the late Act?—Twelve.

923. Sir W. Rae.] May they not be more, if necessary?—I forget the provisions of the Act; there was an Act to enable the court to extend the sittings.

924. Has that Act been repealed?—It has not.

925. Mr. Wallace.] Did the court increase the sittings of the lords ordinary?—They did for one session; they increased them for a fortnight.

926. Have they increased them since?—No, not till the Act of last year.

927. Sir W. Rae.] Does it consist with your knowledge, that the Queen in Council has the power to order the judges to sit longer?—Yes.

928. And that power has not been exercised?—No.

929. Mr. Wallace.] Has there been an arrear of the business before the lords ordinary?—There has been an arrear of the business, both before the lords ordinary and the inner house.

930. To what do you attribute that?—The manner of conducting the business, and the long vacation.

931. Sir W. Rae.] Can you give any account of the amount of that arrear lately?—I have here a statement, showing the number of causes ready for debate but not heard, on the 1st of January last, with the date when the first of those causes was first enrolled in the debate roll.—[*The same was delivered in.*—Vide *Appendix* (B.)]

932. Does it not appear from that return, that that arrear arises from particular judges having more business than others?—They are all in arrear together; the arrear is greater with some than with others.

933. Would you describe any of those judges as having what you consider an arrear, except Lord Moncreiff and Lord Jeffrey?—Lord Cockburn had three causes enrolled on the 18th of December 1839, which should have been heard on the 20th.

934. Do you think it necessary to extend the sitting of the Court of Session, in order to enable that judge to dispose of those three causes?—No, not that particular judge.

935. Then the arrear arises from the particular judges there mentioned having a greater share of the business which they are not able to discharge?—Certainly, from that cause.

936. The suitors have the choice of going to which lord ordinary they please?—They have.

937. What is the remedy against one judge being overburthened, whilst another has no business?—There is no remedy just now.

938. Does not that remedy itself?—Yes, it does to a certain extent, because when suitors see particular judges so much in arrear they will resort to other judges, as they have no chance of their causes being heard for a long time before those particular judges.

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939. If you were to extend the sittings, would not it tend to do away with that remedy?—No, I do not see how it would.

940. You describe the state of things at present to be, that the judge has not the time to decide causes, and therefore parties have found it to their interest to go to another lord ordinary; if you give that lord ordinary so many more means of doing his duty, will not that remedy of going to another lord ordinary cease?—Of course, if the sessions were extended, the practitioners would continue to go before the judge of whom they had the highest opinion; what prevents them just now is the long period which must elapse before the case can be heard.

941. Did you describe the jury cases as cases in arrear?—They are so described here, as cases ready for judgment and not heard.

942. Cannot a case be tried by jury in vacation?—They are generally tried in the vacation, immediately after the court rises.

943. Mr. Wallace.] Is that a Parliamentary return?—Yes, it is.

944. Sir W. Rae.] How far does your account go back?—To the year 1831.

945. Do you view that as a large arrear, requiring an extension of the session?—Certainly, because I do not think there should be any arrear at all.

946. Mr. Wallace.] How many days do the judges sit weekly as lords ordinary?—Four days.

947. Do you mean to state to the Committee that two days in each week the lords ordinary do not sit in their courts?—Certainly.

948. Do the lords ordinary sit even those four days constantly in their courts, or are some of them called away to their duties in the justiciary and other courts?—Occasionally.

949. Then occasionally the lords ordinary are not able even to perform the duties of their court for four days in the week?—It seldom has happened; but since the extension of the sittings under the late Act from the 1st of November to the 12th, and from the 12th of March to the 20th, Lord Moncrieff and Lord Cockburn have been called away from their duties in the Court of Session to the Justiciary Court.

950. Do you attribute the delays occasioned in the Court of Session to any other causes than those you have named?—There are a great number of causes for the delay; the *inducia*, that is the period between serving the writ and the time when it is called in court, are too long; it is 27 days in ordinary cases, and if the defender be out of the country it is 60 days.

951. Chairman.] Is that period fixed by act of sederunt or Act of Parliament?—By Act of Parliament.

952. It cannot be altered without another Act of Parliament?—No, I think not.

953. Mr. Wallace.] When was the making up of records first introduced into the practice of the Scotch courts?—The making up and closing of records on the present system was introduced in the year 1825, but there was always a record before.

954. Are there any duties imposed upon the outer-house judges that ought to be performed by the counsel and agents of the parties?—I think the preparation of records should be imposed upon the counsel and agents of the suitors, and the judges relieved of that duty, and many of the motions might be made before the clerk, and the judges relieved of that duty also.

955. Can you explain, by giving a statement, the usual procedure in an ordinary cause in the outer house, from its commencement to its decision by the Lord Ordinary?—Yes, I have a note here.

956. Be so good as to read it?—[*The Witness read the same.*—Vide *Appendix (C.)*]

957. Will you read the extract from the report of the Law Commission to which you refer?—[*The Witness read the same.*—Vide *Appendix (D.)*]

958. Does the experience which you have had in the court cause you to believe that those opinions expressed by the Law Commission are well founded?—I think so.

959. And that their adoption would be useful in practice before those courts?—Certainly.

960. Were the lords ordinary relieved of the duties to which you have referred in the preparation of records and hearing of motions, would it enable them to decide more causes?—No doubt of it; it would save a great deal of their time.

961. Would



961. Would this saving of the time of the judges be to a considerable extent? *Mr. J. J. Darling.*  
—It would save, I should think, about a third or fourth of the time that they sit in court. 27 March 1840

962. Has your attention been directed to the First and Second Reports of the Law Commission, Scotland, and to the evidence given upon it, upon which these reports were founded?—Yes, I have directed my attention to it.

963. Have you examined those reports carefully?—Yes, I have perused them.

964. Then, generally speaking, do your opinions concur with those expressed by the Commissioners themselves, and by the professional gentlemen they examined, in regard to the duties of judges in the preparing of records and hearing of motions?—They do.

965. Can you refer the Committee to the passages to which you particularly point?—The passage I have given in is one of them.

966. Are there any more?—There are several more in the evidence of witnesses; here is the evidence of Mr. Patrick Shaw, which I have taken out; it refers to motions. [*The Witness read the same.*—*Vide Appendix (E.)*]

967. May not the Court of Session exercise very large powers by acts of sederunt?—Yes, at least they have been in the practice of doing it.

968. Is there any limit, of which you are aware, to their power of regulating the forms and proceedings of the court, unless those are limited by Act of Parliament?—They cannot alter by act of sederunt any regulations laid down by Act of Parliament, but other forms they may regulate.

969. All forms, except those regulated by Act of Parliament, may be regulated by them?—I conceive so, certainly.

970. Would the recommendations of the Law Commission require an Act of Parliament?—Not the whole; but so far as the preparation of the record goes they would; I do not conceive there is any thing which prevents the court from authorizing the clerks of court to call the motion-roll.

971. Or the counsel?—The counsel appear for the parties.

*Lunæ, 30<sup>o</sup> die Martii, 1840.*

MEMBERS PRESENT:

Mr. Ewart.  
Sir Charles Grey.  
Sir Robert Harry Inglis.  
Mr. Serjeant Jackson.  
Dr. Lushington.

Dr. Stock.  
Mr. Wallace.  
Sir William Rae.  
Lord Teignmouth.

THE HON. FOX MAULE IN THE CHAIR.

*Mr. James Johnston Darling* called in; and further Examined.

972. *Mr. Wallace.*] IN your last examination you referred to the First and Second Reports of the Scotch Law Commissioners; have the recommendations of those Commissioners for the improvement of the proceedings in the Court of Session been carried into effect?—Not all of them. *Mr. J. J. Darling.* 20 March 1840.

973. How long have their reports been before the public?—The first six years, and the other five.

974. In your opinion, has the time anticipated by the Law Commission arrived for relieving the lords ordinary of the task now imposed upon them in the adjustment of records?—I think so.

975. Might not this be facilitated by relieving them of the useless labour of calling the hand-roll?—I think it might.

976. Is the time of the Scotch judges much taken up by petty details on unimportant matters which might be easily and advantageously managed by inferior hands?—I think it is.

977. Is it your opinion that suitors and the profession generally are satisfied with the procedure in the outer house under the existing forms?—I believe they are better satisfied with the proceedings in the outer house than in the inner house; but I do not think they have much satisfaction with the proceedings of the outer house.

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house, as I observe that a great proportion of the judgments of the lords ordinary are brought under the review of the inner house, and that that proportion has been increasing of late years.

978. Are those the grounds of your opinion?—Certainly.

979. *Chairman.*] Then, if such is your opinion, are the Committee to understand that, in consequence of this increase of appeals to the inner house, the business of the inner house has increased of late years?—No, it has not.

980. Mr. Serjeant *Jackson.*] What is the meaning of the hand-roll?—It is the roll of motions for orders to give in papers and incidental proceedings in the cause.

981. Dr. *Stock.*] You mean the list of causes heard on a particular day?—There are two rolls; one is called the debate-roll, where the cause is fully heard, and the other the roll of motions to be allowed to revise papers, and so on.

982. And is that called the hand-roll?—Yes, the hand-roll, or the motion-roll.

983. Mr. Serjeant *Jackson.*] Is a great deal of time occupied in calling this roll?—It occupies the lords ordinary an hour or two each day, sometimes less; it depends upon the number of motions; some of the judges will have two, three, four, or five, and others 20, 30 or 40, particularly towards the end of the session.

984. Does it take an hour or two to call those?—Forty motions could not be called in less than two hours.

985. When you speak of calling the hand-roll, you mean hearing those motions contained in the roll?—Yes.

986. You would divest the judges of the hearing of those motions?—Not entirely; but I would divest them of hearing them when they were unopposed; a great proportion are unopposed.

987. What you call motions of course?—Yes.

988. What are those details that you have spoken of as occupying so much time?—For example, ordering the condescendence to be revised, and ordering answers to be given in, and a great number of other details which are not opposed that could be easily disposed of by an inferior officer.

989. Mr. *Wallace.*] Have you any table to prove the number of cases brought under the review of the inner houses?—I have.

990. *Chairman.*] Whence is that table taken?—From the Parliamentary returns.

991. Is the extract you are about to read a partial extract from the Parliamentary returns, or is it an extract showing for a consecutive number of years the number of appeals in each year taken from the outer to the inner house?—It shows, first, the number of final judgments pronounced from the year 1819 to the year 1823, both inclusive; the number of reclaiming petitions against those judgments for two years 1822 and 1823, being the only two years that are mentioned in the report; it is Parliamentary Report 1824, No. 241, page 236; then I have taken the last five years from 1835 to 1839, both inclusive, from the annual returns which are made to Parliament under the authority of the Act 1 Will. 4, c. 69.

992. Why have you prepared that table, omitting to go through the regular return from year to year in showing the number of cases appealed from the outer to the inner house?—There are no returns at all after the year 1823 to the year 1831, and I took those from 1819 to 1823, as being the last five years in the report of 1824; and I took the last five years, from 1835 to 1839, inclusive, as being the last five years in the annual returns.

993. Mr. *Wallace.*] The number of final judgments in the outer house, and litigated causes pronounced by the lords ordinary in the five years from 1819 to 1823 was as follows, as appears by the Parliamentary Report 1824, No. 241, page 236: 1819, 1,421; 1820, 1,481; 1821, 1,305; 1822, 1,628; 1823, 1,288, showing a total of 7,123, and an annual average of 1,424 cases; is this an accurate return?—It is.

994. The number of reclaiming petitions against the judgments of lords ordinary given in the two divisions in two years, to wit, 1821–2, and 1822–3, was, to the first division, 348; to the second division, 392, together, 740, or 370 annually; so that one-fourth, or 25 per cent. of the decisions of the lords ordinary appear to have been submitted to review; is that correct?—It is.

995. The number of final judgments pronounced in litigated cases by lords ordinary in the outer house, in the five years beginning with 1835 to 1839, was

as

as follows: 1835, 649; 1836, 710; 1837, 600; 1838, 507; 1839, 699; together, 3,165; the annual average being 633, *or less than one-half* of the judgments pronounced in the corresponding period of five years from 1819 to 1823, which was 1,424; is this an accurate return?—It is.

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996. By the Judicature Act, 6th of George 4, passed in 1825, reclaiming notes were substituted for reclaiming petitions. The number of reclaiming notes presented against judgments of the Lords in the course of the five years 1835 to 1839, both inclusive, was, in 1835, first division 178, second division 188, total 366; 1836, first division 246, second division 188, together 434; 1837, 223, 233, 456 in all; 1838, first division 174, second 153, 327 in all; 1839, 153 and 171, together 355. These appear to be taken from the annual return to Parliament; they are 1,938 in all, or showing an annual average of 387; is that correct?—It is.

997. Thus it would appear from this return that, whereas before the year 1824 only one-fourth of the judgments of the lords ordinary were submitted to review, 61 per cent. of them are now brought under review, showing that of late years the suitors have not been so well satisfied as formerly with the judgments in the outer house; is that your opinion?—It is.

998. Are the suitors and the profession generally satisfied with the manner in which debates are heard in the outer house?—No; they complain very much of the manner in which counsel are interrupted, and the tedious and piecemeal manner in which debates are heard.

999. What do you mean by the piecemeal manner?—They are heard partly at one time and partly at another, not all at once continuously.

1000. Do you mean that debates are broken off by counsel being called away?—Yes.

1001. What is the cause of this interruption?—The inner houses sitting at the same time with the lords ordinary, and the inner houses having the power to call away the counsel from the lords ordinary to their own courts.

1002. Is that frequently done?—Yes, constantly.

1003. How many judges and separate courts are sitting at the same time?—Two inner houses and four lords ordinary, and also the jury clerks generally.

1004. Do the same counsel practice in all those courts?—They do.

1005. When a case is called and the counsel are not able to attend, is it customary for the counsel to return the fees paid to them?—No, it is not.

1006. Has any remedy occurred to you to obviate the interruptions experienced by the lords ordinary in hearing debates?—If the counsel would divide themselves into counsel for the inner and counsel for the outer houses, it would have a considerable effect.

1007. Have the judges the power of proceeding to hear and determine cases without submitting to postponement on account of the absence of counsel?—Certainly they have; as far as the inner house is concerned they have done it by act of sederunt.

1008. What rule has been laid down by act of sederunt? [*The Witness referred to a book.*]

1009. To what are you referring?—An act of sederunt of the 11th July 1825; I find that this rule was re-enacted on the 12th of November 1825, and again on the 11th of July 1838; the words are the same.

1010. Do the judges of the inner house require counsel to leave the outer house bar on purpose to attend their bar?—Yes.

1011. Is it by virtue of an act of sederunt that the inner house meet at 11 o'clock?—Yes.

1012. Is it by act of sederunt, or how is it, that the roll of causes for the day in the inner house is regulated?—It is regulated by the presidents of the divisions without an act of sederunt; the presidents of each division instruct their clerks to put out what number of cases they think proper.

1013. May not the president of each division direct that a sufficient number of causes should be set down for hearing to occupy the court for the whole day?—Certainly he may.

1014. If the presidents of the divisions were to put in the roll a sufficient number of causes to occupy the court for six hours a day, and if the quantity of papers to be read were not to exceed the present amount, how much more business, in your opinion, could the judges overtake?—They would do more than double, I think.

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1015. Can the judges, under an act of sederunt, change the hours of the court meeting?—Yes, they can.

1016. What advantages would arise from their changing the present hour?—I do not know that any advantages would arise, unless there was some other change made.

1017. Could the inner houses be directed to meet at nine o'clock?—Yes, they might.

1018. If a division of counsel were to take place, and the senior counsel were to attach themselves to the Court of Review, would that be a matter of convenience to the profession generally, and a saving of expense to the suitors?—It would; it would save expense, and great delay and inconvenience, certainly; it would prevent the debate and business in the outer house being interrupted in the way that it is at present.

1019. Would such an arrangement be beneficial to the junior members of the bar?—I have no doubt it would.

1020. Would such an arrangement, in your opinion, be agreeable to the bench, the agents and suitors?—I think it would be highly agreeable to all.

1021. Do the jury clerks insist peremptorily on the attendance of counsel and agents for the preparation of issues?—They do.

1022. At what hour is that done?—Generally about 12 o'clock or 1 o'clock.

1023. Is not that the most busy hour of the day?—It is.

1024. Under whose authority do the jury clerks meet at 12 o'clock?—I rather think it is by their own authority; I do not think there is any act of sederunt upon the subject.

1025. Is there any Act of Parliament for it?—No, none.

1026. In practice is it found highly inconvenient that the jury clerks should meet at 12 o'clock?—It is found highly inconvenient, certainly.

1027. Would it expedite the business of the other courts, if a more convenient hour were fixed for the framing of issues?—It certainly would; it would also expedite the framing of the issues themselves, because it is very difficult to get senior counsel to attend at the time of the framing of the issues.

1028. Could not this inconvenience be obviated by act of sederunt?—Yes, it might; and I suppose it could be done by the simple direction of the president of the court.

1029. Under the present mode of framing issues in Scotland, is much expense and delay incurred?—Yes, there is a great expense and delay.

1030. Does that create public dissatisfaction generally?—Of course.

1031. Do not a great many questions arise at present on points of form in the courts?—They are very numerous indeed.

1032. Do these questions occupy the time of the court more than formerly?—Much more.

1033. Does the frequency of such questions add to the dissatisfaction you have spoken of?—No doubt of it, to a great extent.

1034. It has been given in evidence before this Committee that more than 2,000 questions have arisen in point of form since the passing of the Act in 1825; is that your belief?—Many more, I should think.

1035. Do you mean to state many more than 2,000?—Yes.

1036. Have not these questions of form been settled at the expense of the suitors?—They have.

1037. Can you inform the Committee at what average cost, perhaps, each of those questions have been so settled?—I should suppose 10*l.* each side, 20*l.* each point.

1038. Do you mean to say that the interpretation of the Judicature Act, and the acts of sederunt, which have been passed to carry the provisions of that Act into effect have cost 40,000*l.* to the suitors in the Court of Session?—The Judicature Act and other Acts of Parliament, and acts of sederunt regulating the proceedings before the court, I have no doubt have cost that.

1039. Seeing that so many questions of form are now settled, will not that relieve the business of the courts, and the occupation of the judges?—To a certain extent, but new points are constantly arising; the Acts that were passed last year and the year before have raised a number of points already.

1040. What Acts do you speak of?—Acts of Parliament principally.

1041. In the course of your practice as an agent before the court, have you found

found great difficulty in making your clients understand why the decision of their case on the merits should be postponed, in order that doubtful points of form may be tried and settled at their expense?—I have always found great difficulty, and never could make them understand why such points should be settled at their expense, or why their cases should be delayed on that account.

1042. *Chairman.*] Have you never been able to explain it to them?—I have explained it to them, but they never could see why they should be at the expense of interpreting acts of sederunt and Acts of Parliament.

1043. *Mr. Serjeant Jackson.*] Must not questions necessarily arise in the construction of Acts of Parliament?—Yes; but some of the questions are so frivolous that parties cannot understand the use of trying them at all.

1044. *Dr. Stock.*] Are not costs given, when frivolous questions are raised, against the parties raising those frivolous questions?—Yes.

1045. *Mr. Serjeant Jackson.*] Do you conceive it to be possible for any arrangement to be made by the judges which will preclude the parties and their counsel from raising questions upon Acts of Parliament relied upon in the course of the cause?—I wish to give a specimen, as that will be more intelligible to the Committee.

1046. Is it not an inevitable consequence of carrying on business in the judicial department that questions should arise on the construction of Acts of Parliament?—Clearly.

1047. How is it possible, by any regulation of the court to prevent such questions being raised?—I am going to explain how they could do it. Here is an Act for instance, "An Act to amend the Law of Scotland in matters relating to Personal Diligence, Arrestments and POUNDINGS." Now, one of the enactments, section 32, is as follows, "And be it enacted, that the extracts of citations, deliverances, schedules and executions may be either printed or in writing, or partly both, and that, excepting in the case of poundings, more than one witness shall not be required for service or execution thereof." Now a question has arisen under that Act, whether in serving an inhibition one witness is sufficient, considering that an inhibition is not a personal diligence or an arrestment, or a pouding; the court, if they chose, by act of sederunt, could explain that, and state whether they include inhibitions or not.

1048. *Sir C. Grey.*] Has the question arisen more than once?—The question has arisen once or twice in the outer house, but I do not know what decision has been given; and the same question has been raised three or four times, in regard to summonses, because a summons to call a party into court is not a personal diligence, neither is it an arrestment nor a pouding.

1049. *Dr. Lushington.*] How could the Court of Session explain that?—By act of sederunt.

1050. Could they give an explanation of an Act of Parliament by an act of sederunt?—They have always been in use to do so.

1051. Before any question has been raised upon it or discussed by counsel?—I think so, when they see an ambiguity in the Act.

1052. Is it the custom of the Scotch judges to dispose of that ambiguity before the difficulty occurs in the course of practice and the objection is taken?—They do it by act of sederunt, without waiting till the case is raised for judgment.

1053. *Sir R. H. Inglis.*] The Committee understood that it was so far from being the practice of the court to adopt the course which you now suggest, that you made it a matter of complaint that they had not done it and thereby encouraged litigation; is not that the construction the Committee are authorized to draw from your last questions and answers?—The court have not, by act of sederunt, explained the meaning of that section of the Act in such a manner as to prevent the questions being raised whether it includes the diligence of inhibition, and also ordinary summonses, or is confined to personal diligence.

1054. Then it is not the practice of the Court of Session by act of sederunt to give *à priori* constructions of an Act of Parliament prior to a case arising in which such a question might arise?—It is the practice; we have here, for instance, "An Act for diminishing delay and expense in Advocations and Suspensions in the Court of Session in Scotland, 10th of August 1838," on the 24th of December 1838, they made an act of sederunt explaining it.

1055. Do you mean the Committee to understand that, in reference to an Act of Parliament not vesting specially a discretion in the Court of Session, they assumed such discretion and gave a construction to an Act of Parliament prior to

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1056. The questions lately put to you have had reference, not to the business of the court, but to abstract constructions of Acts of Parliament, in reference to matters which might come before the court as between party and party, but which did not come before the court, and the non-decision of which by the Court of Session has been in your previous answers made a matter of complaint against the court; is that the case in reference to your former answers?—Certainly, the court should explain the law on points of form, and state what they mean to hold as law in future.

1057. Are the Committee to understand that you hold it to be within the competence of the judges of the Court of Session to give authoritative interpretations of Acts of Parliament prior to the question arising in which that interpretation is invoked by suitors?—They have been in the practice of explaining the law on points of form, both Acts of Parliament and the common law, before the question arose.

1058. *Chairman.*] Do you mean to say that it has been the practice of the judges of the Court of Session to give a judicial opinion upon an Act of Parliament affecting the common law, before any questions relative to that Act of Parliament have been argued before them?—Yes; and they have been in the habit of altering the law altogether, by introducing proceedings contradictory to Acts of Parliament—inconsistent with the provisions of Acts of Parliament.

1059. Mr. Serjeant *Jackson.*] Before any question has arisen upon those Acts?—Yes; they altered the law with regard to the removal of tenants from their possessions in 1756.

1060. Before any question arose in court?—Yes; they made a new system altogether of removing, contradictory to one that had been previously laid down by Act of Parliament.

1061. Dr. *Stock.*] Has there been any recent example of that interference with Acts of Parliament?—There has not been so much interference of late years.

1062. *Chairman.*] The last interference, to your knowledge, took place in 1756?—Yes.

1063. From what took place in 1756, you have given a general opinion that it is the habit of the Court of Session by act of sederunt to alter the law as laid down by Parliament?—From what took place in 1756, and previously; the powers of the court have never been restricted by statute.

1064. Mr. Serjeant *Jackson.*] Are you sure, in that instance of 1756, the court took upon itself to do that by act of sederunt, without any question having arisen upon the construction of the Act of Parliament in question?—They altered the system of procedure in removals.

1065. Dr. *Lushington.*] In point of fact, in former times was not the power of the Court of Session, with respect to making acts of sederunt, considered to be much larger than at present?—Certainly it was; but that power has never been restricted by Act of Parliament.

1066. Dr. *Stock.*] You have given it as your opinion, that a good deal of litigation might be avoided if the judges would make acts of sederunt explaining matters of practice arising out of Acts of Parliament; do not you think that that system would be liable to this inconvenience, that the acts of sederunt itself might stand in need of explanation, and give rise to even more questions than the Act of Parliament?—No doubt, if it was not properly made.

1067. The Act of Parliament fails in that particular, and we cannot presume that the Legislature will be less accurate than the Court of Session?—But the blunder might be observed by the judges of the court, although it did not strike the Legislature.

1068. Have you known any instance where an act of sederunt, made to explain an Act of Parliament, has been subject itself to grave doubts?—Certainly, it is very usual.

1069. Mr. Serjeant *Jackson.*] Have you in Scotland a code of general rules governing the practice of the court?—There are acts of sederunt which regulate the proceedings in the court for 300 years back.

1070. Do not a large number of questions arise upon those rules of practice?—A very great number indeed.

1071. You propose to diminish litigation upon these questions by making acts of

of sederunt for the purpose of interpreting the law; would that not have rather a contrary effect?—Where an obvious blunder or omission had taken place, or there was an ambiguity, it would prevent litigation to declare by act of sederunt what was the true meaning.

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1072. Sir R. H. Inglis.] Do you mean, that the Court of Session are to judge of what they call an obvious omission of an Act of the entire Legislature, and supply such omission at their own discretion?—Here is a specimen of it, done two years ago: “The office of the keeper of the records of the Court of Session and the keeper of edictal citations having been disjoined by the said statute, 1st and 2d Victoria, chapter 118, it is hereby declared, that all citations against persons forth of Scotland shall be made at the office of the keeper of edictal citations, notwithstanding that the Record Office of the Court of Session is mentioned in the said schedule, number one, annexed to the said Act 1st & 2d Victoria, chapter 114, and the Act 6th Geo. 4, chapter 120.”

1073. You mean that this discretion, whatever it may have been, was exercised by the Court of Session, not being given to them by the Act itself which you have quoted, that it was assumed by them without any such authority?—It was assumed by them. The Act of Parliament declared that the citation should be left in one office, and the Court of Session declared by act of sederunt that it was to be left in another.

1074. Mr. Serjeant Jackson.] Did the Act give them authority to do that?—It gave them authority to carry the Act into effect, but they have not done that.

1075. You have given that as an instance of the court taking upon itself by act of sederunt to supply omissions in an Act of Parliament?—Yes, and to explain an ambiguity or correct a blunder; it appears to be an instance of that.

1076. Dr. Stock.] Was not that made necessary by the exigence of the public business, inasmuch as those citations must issue from some office or other, and the other office which the Act of Parliament mentions had ceased?—No, it was transferred to a different officer.

1077. Was there not a necessity for making some rule on the subject?—No, one officer might receive the citations as well as the other.

1078. Mr. Serjeant Jackson.] Antecedent to passing the Act, it would appear that those two officers, the keeper of the record and the keeper of edictal citations, were one and the same officer?—Yes.

1079. And that Act separated them?—Yes.

1080. Then it was necessary to allocate with one of those officers the duty of receiving citations, and the act of sederunt did that?—Yes, but the office of keeper of records still existed.

1081. But even so it was right that the citation should issue from one certain office?—Yes; I do not object to the act of sederunt itself, but it proves that they exercised the power I said they possess.

1082. Sir R. H. Inglis.] Have you read the Act of the 1st & 2d of Victoria, chapter 118, section 33?—I have. [*The Witness produced the Act, and the 33d section was read, as follows:*] “And be it enacted, that the Court of Session shall be and is hereby empowered, from time to time, from and after the passing of this Act, to make such further regulations by act of sederunt as the said court may deem meet for the purpose of carrying into effect the purposes of this Act, and of duly apportioning the business, and regulating the duties to be performed by the several clerks and officers of court, and also for the purpose of regulating any additional duties which the court may think fit to require to be performed by any of the judges’ clerks, and which regulations such clerks and officers shall be respectively bound to observe, without any claim to further remuneration; and the said court may meet for the above purposes during vacation, as well as during session, and may alter and amend such regulations from time to time: provided also, that within fourteen days from the commencement of every future Session of Parliament, there shall be transmitted to both Houses of Parliament copies of all acts of sederunt passed under the powers herein given.”

1083. Having heard that section read, do you think that the judges exercised any other than the discretion specially conferred upon them by Act of Parliament in making the act of sederunt to which you have called the attention of the committee?—Perhaps they did only exercise the discretion given them.

1084. Then the instance you have given of the judges exercising the power



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1085. Mr. Serjeant *Jackson*.] Which you would propose, by way of improvement in the existing administration of the law of Scotland, would be to take matters back again to the state in which they were in, and prior to 1756?—I am not aware that the judges have ever been restrained from making acts of sederunt to regulate matters of practice.

1086. I understood you, in your answer, before the Act of Parliament was read, to have conveyed to the Committee that, in your judgment, it would be desirable for the judges to take up Acts of Parliament and put a construction upon them before questions arose in court upon the construction of those Acts?—I think it would be an advantage to explain ambiguities in Acts of Parliament.

1087. Sir *R. H. Inglis*.] Your former answer had reference, not to the settlement of points of practice under the law, but to supplying omissions or defects in the actual law; do you wish to retain that opinion?—Omissions and ambiguity in points of form were the words I used.

1088. Mr. *Wallace*.] Is the Court of Session in the habit of revising the acts of sederunt annually, or at any stated periods?—No, they are not.

1089. You have stated that those acts go back a great many years; so far as you know, have they ever been revised and consolidated by the court itself?—They never have; that is, the whole body never has; particular acts have been revised and consolidated.

1090. Are those acts of sederunt communicated to the profession and the public before being passed?—They used to be communicated at one time; but the late acts of sederunt, I think, have not.

1091. You mentioned in your former evidence that one of the causes of the decrease of business in the Court of Session is the expense; how do you propose to diminish this expense?—If the preparation of the records and the hearing the motion-roll were taken from the lords ordinary, as I proposed, it would have considerable effect in diminishing expense.

1092. Mr. Serjeant *Jackson*.] Do you apprehend that could be done by act of sederunt, or would it require an Act of Parliament?—Perhaps the calling of the motions may be done by act of sederunt, but an alteration in the preparation of the records would require an Act of Parliament.

1093. Mr. *Wallace*.] Does the present practice of giving remits to accountants cause delay and expense?—Yes.

1094. Could the present mode of remitting to accountants be altered by act of sederunt?—Yes, I think it could.

1095. Sir *R. H. Inglis*.] A large portion of the latter questions and answers have proceeded upon an understanding on the part of the Committee that you alleged as a complaint to the existing constitution or practice of the Court of Session, that they entertained frivolous points in respect to the construction of Acts of Parliament; do you think that any alteration, whether by Act of Parliament or by act of sederunt, can prevent suitors raising questions, which the court may regard as frivolous, and as therefore a consumption of their time, which in this case is the time of the country?—They may not be entirely able to prevent suitors from raising frivolous points; but they may diminish the power of suitors to raise frivolous points.

1096. Can they so diminish the power of suitors to raise frivolous points, except by an alteration of the common law of the land?—They have been in the habit of altering the common law of the land to that extent.

1097. You have given an instance in the year 1756, and you stated that your own recollection does not supply you with any later instance; are the Committee to understand, that you still mean to say, that since the year 1756 this power of the Court of Session to narrow the questions which the common law has left open has not been exercised?—I do not at present recollect any other.

1098. Sir *W. Rae*.] As explanatory of the answer which you made in regard to the court having altered the Act of the 1st & 2d Victoria, by act of sederunt, I wish to ask, prior to the passing of that Act, where were the edictal citations recorded?—At the Record Office.

1099. Was that under Act of Parliament?—Yes.

1100. The Act of 1st & 2d of Victoria abolished the office of keeper of records, did it not?—No, it removed it to —

1101. Are

1101. Are you aware that these are the words of the Act: "Be it enacted, that the office of keeper of records, established by the said Act passed in the 55th year of the reign of his Majesty King George the Third, shall be and the same is hereby abolished, and the duties of the office shall be performed by the principal extractor and his assistant, with the aid of a clerk?"—I understand that the office had been transferred to the extractor.

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1102. Did the clause provide for any other office in which the deed should be recorded?—It provided, that "the duties of the office shall be performed by the principal extractor and his assistant, with the aid of a clerk, in case it shall appear to the said principal extractor to be proper and necessary to appoint such clerk, who shall receive such salary, not exceeding 100 *l.* per annum, as shall be fixed by the said principal extractor, and no fees shall hereafter be received by any person performing the duties of the said office." Nothing is specifically there stated as to the office at which the edictal citations should be left; it is stated, that the duties of the office, one of which was the receiving edictal citations, should be performed by the principal extractor and his assistant; now the court, by act of sederunt, transfers those duties to another officer in the face of the Act of Parliament.

1103. Clause 33 having authorized the court "to make further regulations, by act of sederunt, for carrying into effect the purposes of this Act, and duly apportioning the business and regulating the duties to be performed by the several clerks and officers of the court," do you consider that the court were not sanctioned in specifying the office, the clause itself having specified no office, and then transferring to that office the duties connected with the registering of those deeds?—It appears to me that this Act gave the duties of receiving the edictal citations to the principal extractor, and that the court took these duties from that officer and gave them to another.

1104. Does not the power to equalize the duties, in section 23, sanction the court in making the act of sederunt?—I have great doubt whether, because they have power to regulate duties, they could take the duties from one officer and transfer them to another; it does not appear to me that that is carrying the purposes of the Act into effect.

1105. Is it not more convenient that those documents should be registered in the register-house?—It is not; both offices are in the register-house.

1106. Sir R. H. Inglis.] Does not the phrase, "duly apportioning and regulating the duties to be performed by the several clerks and officers of the court," fully sustain the judges of the Court of Session in the distribution, to which, in the first instance, you called the attention of the Committee, as an instance of their making the law instead of interpreting it?—I do not think that this Act of Parliament gave the Court of Session the power to transfer the duties of one officer to another.

1107. Mr. Serjeant Jackson.] Does it not expressly give authority to "duly apportion and regulate" the business transacted?—Certainly; here are different offices mentioned in this Act, the office of extractor, and the office of keeper of the minute-book: I say that this Act of Parliament does not entitle the court to make the keeper of the minute-book the extractor, or the extractor the keeper of the minute-book, and yet that is regulating the duties.

1108. Dr. Stock.] What construction do you put upon the words "apportion and regulate"?—I do not think it was in the power of the court to alter the Act.

1109. Mr. Wallace.] Do you consider it to be necessary to retain the rule, that, with a few exceptions, all summonses and defences shall be printed in the outset of the cause?—No, I do not think that they should be printed.

1110. Is there not much unnecessary printing by the judges of the inner houses in this way?—The unnecessary printing is principally in the outer house.

1111. Are many complaints made upon this subject?—Yes, there are some complaints made, certainly.

1112. Sir W. Rae.] In case parties go to the inner house, will not those printed cases be wanted?—Yes; but many do not go to the inner house.

1113. Is the expense of printing very high?—Four or five or six pounds.

1114. If not printed there would be copies made?—Yes.

1115. That would add to the profits of the practitioners?—No doubt it would.

1116. Mr. Serjeant Jackson.] Is printing or writing several copies the more expensive?—It depends upon the number; printing is more expensive than making all the copies that would be needed at the outset of the cause.

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1117. How many copies are generally necessary to be printed?—It is usual to print 40 or 50.

1118. It being necessary to have 40 or 50 copies?—No, it is not necessary to have more than three or four copies.

1119. Sir *R. H. Inglis*.] Is it a rule in printing in Scotland, that the press for 250 copies is the same as the press for one copy; are you aware of the fact being so, either in England or in Scotland, with respect to typography?—I understand the expense of setting up of the types is the same whether it is intended to print 250 copies or 100 copies or one copy.

1120. In other words, if any print be necessary, the number of copies taken by the press under 250 is necessarily a matter of indifference, with the exception of the mere cost of paper?—Yes, and of the throwing off the impression. I do not understand it is the rule in Scotland not to make a charge for throwing off the impression.

1121. If any copies be required in manuscript, of course they are paid one by one?—Yes.

1122. Sir *W. Rae*.] The saving would arise in cases that were not carried to the inner house?—Yes.

1123. Do not you think that there would be some convenience to the Lord Ordinary in reading a printed paper instead of a written copy?—Yes; but he has to read the condescendence and answers in manuscript; and I do not see why the other papers should be printed any more than those.

1124. What may be the average expense of printing those?—I do not know; I should suppose five or six pounds in general for printing the summons and defences.

1125. Sir *R. H. Inglis*.] What would be the expense of making the copies in manuscript of the same paper, the printing of which would cost five or six pounds; if you required 20 copies in print, what would be the expense of making them in manuscript?—It would be much more expensive to make 20 copies in manuscript; but we do not need so many.

1126. What number do you require?—Four would be sufficient in general.

1127. What would be the expense of making four transcripts of a paper, which in print would cost five or six pounds?—I think it would cost about two pounds.

1128. Mr. *Wallace*.] Are jury trials very expensive in the Supreme Courts?—They are.

1129. Is the danger of being involved in a jury trial one of the causes of the decrease of business before the Court of Session?—I should think so.

1130. Sir *W. Rae*.] Supposing the proof is taken by commission, is not that attended with great expense?—It is.

1131. Can you venture to say that the expense attending that mode of proof is less than the expense of trial by jury?—I do not know that it was much less; but the expense in that case did not come on all at once, as it did in jury trials; people could afford to pay 20 *l.* or 30 *l.* a year for carrying on a case, when they could not pay 150 *l.* at once; but it is not merely the expense of jury trials, but it is the dissatisfaction with trials by jury.

1132. Mr. *Serjeant Jackson*.] Who makes the advances of money in the progress of causes?—The attorney.

1133. Then it is an inconvenience to the attorney to have to advance those large sums?—Yes, and to the parties; the attorney has to ask them for money during the progress of the cause.

1134. The former course of proceeding was much more dilatory?—Much more.

1135. Therefore more of the time of the court was occupied in that dilatory course of proceeding than in the present?—Yes, and in reading the printed proofs the time of the court was occupied.

1136. Did not that also aggravate the expense?—No, the time of the court the suitor does not pay for.

1137. Must not he pay his counsel and the writer to the signet whom he employed?—He did not give his counsel and agent so high fees as he did in jury trials.

1138. Mr. *Wallace*.] There is no such thing as those commissions now; they are done away with?—Yes; except in consistorial causes.

1139. Was the dissatisfaction with the mode of taking proof by commission so exceedingly great that it was complained of throughout the country?—Yes, it was much complained of in inferior courts, where it is still practised.

1140. And the trial by jury is universally unpopular?—Yes.

1141. The expense is one cause of the unpopularity?—Certainly it is.

1142. Were

1142. Were the preparation of causes removed from the lords ordinary, might not the business of preparing records proceed during vacation?—Certainly it might. Mr. J. J. Darling.

1143. So that when the court met, there would be little else for the judges to do than hear debates?—Certainly.

1144. Would not this abridge the labours of the judges greatly?—It would to a considerable extent.

1145. Sir *W. Rae*.] Are the agents very anxious about doing business in the vacation generally?—Yes, I think they are willing to do business at any time.

1146. Do the leading agents not leave Edinburgh during the vacation as well as other people?—Some of them do, but not during the whole vacation, or any thing like it.

1147. Mr. *Wallace*.] Do the agents ever leave Edinburgh so long as they can find employment?—I do not think any of the agents ever remain out of Edinburgh during the whole vacation.

1148. Mr. Serjeant *Jackson*.] That is, they return to Edinburgh when the session approaches, in order to make preparation?—They go away for a month or two, but not for four months.

1149. Sir *C. Grey*.] You require the assistance of counsel to make up those records?—Yes.

1150. Are you sure of getting them in the vacation?—Yes; there are always some counsel; there are plenty of counsel in town.

1151. Mr. *Wallace*.] Does not the length of the vacations create a very considerable dissatisfaction throughout the country?—Certainly it does.

1152. Would it be desirable that the sittings of the court should be very considerably lengthened?—I think so.

1153. Would not this enable the court to give greater despatch to business?—It would, certainly.

1154. Would it not diminish the arrears which at present exist?—Certainly it would.

1155. Sir *W. Rae*.] To what extent do the arrears in the Court of Session require that the length of the session should be increased?—The second division is at this moment nearly a month in arrear; they have as much business as they can do between the 20th of May and 17th of June, both days inclusive, beyond the mere routine business of motions, and so on. The first division has business from the 20th of May till the 11th of June.

1156. What is that taken from?—From the roll which is put out for the summer session.

1157. May not some causes take more time than others?—The second division have causes put out for each sederunt day from the 20th of May to the 17th of June.

1158. Mr. *Wallace*.] Does that appear from the records of the court?—It does.

1159. Sir *W. Rae*.] Have you examined the returns before Parliament, as to the extent of arrears annually given?—Yes.

1160. Do they bear you out in that extent of arrear?—I have prepared a table showing the arrears, with the exception of 1834, and they appear to bear me out completely.

1161. Mr. *Wallace*.] Read the table.

[*The Witness read the same, as follows:*]

“TABLE showing the Arrears of Business in the Court of Session on the 1st of January in each of the following Years, made up from the Annual Returns to Parliament.

#### I. OUTER HOUSE.

CAUSES ready for Debate but not heard, and Cases at Avizandum.

	Debate.	Avizandum.	
1832 -	146	63	209
1833 -	184	56	239
1834 -	-	-	-
1835 -	243	46	289
1836 -	146	5	151
1837 -	47	22	69
1838 -	74	20	94
1839 -	146	12	158
1840 -	151	24	175

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II. Inner

Mr. J. J. Darling.

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## II. INNER HOUSES.

## NUMBER of CAUSES ready for Judgment, exclusive of Jury Causes.

	First Division.				Second Division.				
1832 -	-	-	17	-	-	42	-	-	59
1833 -	-	-	17	-	-	42	-	-	59
1834 -	-	-	-	-	-	-	-	-	-
1835 -	-	-	40	-	-	15	-	-	55
1836 -	-	-	80	-	-	19	-	-	99
1837 -	-	-	47	-	-	44	-	-	91
1838 -	-	-	39	-	-	34	-	-	73
1839 -	-	-	29	-	-	25	-	-	54
1840 -	-	-	48	-	-	30	-	-	78

When the inner houses rose on the 11th March 1840, the first division had as much business as to occupy its time from the 20th May to the 11th June; and the second division had as much business as it could despatch between the 20th May and the 17th June."

1162. *Chairman.*] What do you mean by jury causes; do you mean that they form any part of the arrear?—A few causes that were ready for trial by jury.

1163. *Mr. Wallace.*] For what period has the Crown the power of extending the sittings of the court?—One month each year by the Act 1 Will. 4, c. 69.

1164. Do you conceive this month to be sufficient to enable the court to get through its business?—No, I think it too little.

1165. Has this power of extension by the Crown been ever exercised as it regards the inner houses?—Never.

1166. Has it been exercised with regard to the outer houses?—I think it was exercised once in order to extend the sittings of the Lord Ordinary for a fortnight.

1167. What has been the effect of extending the sittings under the Act which empowers the Crown to alter the commencement of the sittings from the 12th to the 1st of November, and from the 12th to the 20th of March; that appears to be an extension of six sitting days in November and the same number in March, or 12 court days in all?—This extension is not made by the Crown, but under the late Act of Parliament which raised the judges' salaries.

1168. What has been the effect of that?—To diminish the arrears to a certain extent.

1169. *Dr. Stock.*] Has it been made by the judges themselves?—No; the Act of Parliament which enabled the Crown to extend the sittings was the 1st Will. 4; last year the Act which increased the salaries of the judges extended the sittings.

1170. *Mr. Wallace.*] Is there any appearance now of this extension of time being sufficient to remove the arrears of the lords ordinary?—No.

1171. Is it in any way calculated to remove the arrears of the inner houses?—No, it is rather calculated to increase the arrears of the inner houses, by bringing in business from the lords ordinary.

1172. As it appears, from the statement you have made, that the business of the court has fallen off nearly one-third of late years; do you think the number of judges might be diminished without inconvenience?—I certainly do; not only has the business been diminished, but the forms of practice have been very considerably simplified, whereby the judges are enabled to do more business.

1173. Looking at the business which the courts have now to perform and that which they used to have to perform, I wish to be informed how many judges there were in the Court of Session during the latter part of the last century and the earlier part of this?—There were 15.

1174. Was it ever considered, when the business of the court got into arrear, that there were too few judges?—Never.

1175. Did you ever hear of any proposal to augment their number?—No, I never heard of any such proposal.

1176. Was any proposal ever made to diminish their number?—Yes, it was.

1177. Can you produce evidence of this?—There was a Bill which was introduced into Parliament in the year 1785, by Sir Ilay Campbell, then Lord Advocate of Scotland.

1178. Have you reason to believe the number "ten" was really intended to be inserted in the blanks in the Bill?—I believe so.

1179. You express your belief to the Committee that the number "ten" was the number intended to be inserted in that blank?—I do.

1180. Suppose

1180. Suppose the sittings of all the judges were extended two months longer, and the lords ordinary relieved of the duty of preparing causes and hearing motions, and the inner house reduced to a mere court of review by getting rid of the summary applications, and that the inner judges were enabled to meet at nine instead of eleven o'clock, by the counsel dividing themselves into inner and outer house counsel so as to confine themselves to those separate courts, and that the courts sat, as in England, for six and seven hours a day, instead of about two, as at present, how many judges could be dispensed with?—I think four judges could be dispensed with; one of the inner houses.

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1181. Is it the opinion of a considerable portion of your brethren that, with such changes as you have proposed, the court might be reduced to nine judges?—Yes; I understand there is a considerable proportion of the agents of the court who are of that opinion.

1182. Have you any evidence to quote in support of the opinion you have now expressed?—I find in the Appendix of the Second Report of the Law Commissioners of Scotland, at page 17, the opinion of Mr. Daniel Fisher, who has had more experience as a law agent in the Court of Session than any other person now living, which is to this effect: "My opinion therefore is, that the court should be relieved entirely of all petitions and incidental applications in the first instance, and should never be called upon at all until the cause, whatever may be its nature or in whatever form it may originate, shall be ripe for hearing counsel with a view to judgment; in short, every cause coming before the court should be concluded so far as preparation is concerned; all those summary applications should therefore come in the first place before the ordinary; the court at present do nothing but order intimation and order answer to be put in, which may as well be done by an ordinary; if, after intimation, no answers are put in, the Lord Ordinary may either dispose of the application, or, if the authority of the whole court is requisite, his lordship can report it as at present at the foot of the clerk's table. Were the court relieved of all the kind of business to which I have alluded, and their time and attention exclusively devoted to the giving of judgments in causes fully prepared, then I am of opinion that one court would be perfectly sufficient for the disposal of the whole number of causes coming into court."

1183. Supposing the judges were reduced to nine, four to sit as a court of review in one chamber, and five as lords ordinary, as at present, how could a majority be procured in the Court of Review, in the event of the judges of that court being equally divided in opinion?—Just as at present, by calling in a lord ordinary.

1184. Sir W. Rae.] Is that the law at present?—The law at present is, that in case of an equality of division, the Lord Ordinary who decided the case in the outer house is called in.

1185. Are you sure of that?—I think so; that seems to be the provision of the statute 1 & 2 Geo. 4, c. 38, s. 3, which has not been repealed.

1186. Mr. Wallace.] Supposing the taking away of four judges was considered too great a reduction, might not the number of judges of the inner house be reduced from four to three in each court?—I think they might.

1187. What is the consequence at present when the four judges are equally divided in opinion?—The Lord Ordinary who decided the case is called in from the outer house.

1188. Are you aware what proportion of the decisions of the lords ordinary are affirmed just now?—I cannot say with accuracy, but I should think about three-fourths or four-fifths.

1189. Suppose there were only three judges in the inner house, would your calculation be something like this, that, out of three or four causes where there was a difference of opinion in the inner house, there would be three judges in favour of the decision and only one against it?—If the two inner-house judges affirmed the decision of the Lord Ordinary and one was against it, there would be three judges in favour of the decision.

1190. In case of equality of opinion, at present, is it not the Lord Ordinary who decided the case in the outer house who is called in to assist?—Yes.

1191. And then, supposing all the judges to adhere to their opinion, the majority is three to two, is it not?—Yes.

1192. Is it your opinion, and that of those you professionally associate with, that the bar of Scotland (especially since the business has been so much reduced), can adequately maintain a bench of 13 judges?—I should hardly think it.

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1193. Mr. Serjeant *Jackson*.] Do you think that there are not a sufficient number of gentlemen of great talent and intelligence at the Scotch bar to maintain a bench of 13 judges?—I think not, since there has been such a reduction of business.

1194. How many gentlemen of the bar are there in Scotland?—About 400.

1195. How many gentlemen are there practising in the court?—Two hundred or 250.

1196. Is it your opinion that there are not among those 200 a sufficient number of gentlemen of learning and ability to maintain a bench of 13 judges?—Perhaps there are, but it would leave the bar very weak if there was to be a large promotion of the eminent lawyers.

1197. Mr. *Wallace*.] Taking the present time, could the bar supply a considerable number of vacancies, say three or four vacancies?—If there were four vacancies; if the four most eminent lawyers of the Scotch bar were promoted, it would leave the bar weaker than it has ever been at any former period.

1198. Mr. Serjeant *Jackson*.] Have you not gentlemen of promising talent in Scotland who would step forward and fill those vacancies?—It is impossible to say.

1199. Dr. *Stock*.] That is the natural course of things, is it not?—Yes, but the bar is much weaker at present than it was when I first knew the profession, weak in point of talent, at least in public estimation.

1200. May not that arise from the circumstance of there being less occasion to call them forth?—That may be; I am talking of what exists; but I suppose any man can see that at present there are not men of sufficient talent and intellect to keep up a bench of 13 judges.

1201. Are Scotchmen degenerating in the present day in point of talent?—I cannot tell, I am sure.

1202. Mr. *Wallace*.] Can you state to the Committee what proportion of the cases brought under the review of the inner house the judges are unanimous in deciding at present?—I cannot state with any certainty, perhaps three-fourths or more I should think.

1203. Considering the mode in which the business is conducted at present, is it considered advantageous to the administration of justice to have a court consisting of numerous or few judges?—I should think a court consisting of three judges would be enough.

1204. Looking at the delay and the expense occasioned in cases of equality at present, the additional responsibility by having three instead of four judges, and that only in few cases the two judges would be as two to one, do you see any advantage in keeping up the number of four instead of three?—No; I cannot see any advantage; the chance of equality appears to me to be a great evil in the number of four.

1205. When was the making up of records introduced in Scotch practice under the present form?—In 1825.

1206. When were permanent lords ordinary first appointed?—They were first appointed, I think, in 1810.

1207. Was the business of the court at that time greater or less than at present?—It appears to have been greater.

1208. Was it of greater importance?—I do not know that there is much difference, or how it is possible to judge of the importance of business before the court.

1209. Mr. Serjeant *Jackson*.] When you say the business was greater, do you judge from the number of causes?—Yes.

1210. Do you think that a correct criterion?—It is the only criterion I can judge by; I know of no means of judging of the importance of the causes.

1211. Mr. *Wallace*.] Is there any reason to suppose that the business before the court now is more important than it was formerly?—No, the reverse; because much fewer cases are reported now than were reported about 20 years ago.

1212. Mr. Serjeant *Jackson*.] Would not one expect that, as the country improves in wealth, and as dealings between men and men extend, the number of causes of importance would be greater?—One would expect it, but it has not done so as far as the Court of Session is concerned; perhaps the increased civilization of the people, and greater education, may lessen litigation.

1213. Mr. *Wallace*.] May not a dissatisfaction with the court have great effect?—Yes.

1214. Mr. Serjeant *Jackson*.] Do you imagine the improved education of the people



people has been a cause of diminution of business?—I should think as education increases, the inclination to carry on law suits will diminish. Mr. J. J. Darling.

1215. Sir *W. Rae.*] Are the people who carry on law suits generally people of education?—A great proportion of the law suits come from the less civilized parts of Scotland; in proportion to the wealth and civilization of the district the number of cases is less. 30 March 1840.

1216. It requires that parties should possess some money in order to carry on a law suit?—Yes; people formerly did not carry on law suits without money.

1217. Those parties you think had less education formerly?—They were less educated than at present.

1218. Mr. Serjeant *Jackson.*] Would you apply your remark to that class of persons?—I conceive that all are now better educated.

1219. Is it your opinion that dissatisfaction with the court has, in point of fact, produced that diminution of business?—I have no doubt of it whatever; it has led to arbitrations and compromising causes, settling them in various ways extra-judicially.

1220. Mr. *Wallace.*] Is the opinion very general in accordance with what you have now expressed?—I should say so.

1221. Looking at the number of causes coming into the outer house, in what proportion has the business decreased?—I think I answered the question upon my former examination by producing a table showing the number of cases that have come in at different times. The diminution is fully a third.

1222. Supposing the sittings of the lord ordinary extended to eight or ten weeks longer than at present, and keeping in view the decrease of business which has already taken place, might not one of the lords ordinary be dispensed with?—I do not think you could extend the sittings of the lords ordinary eight or ten weeks more than at present, because their sittings have been extended three weeks; but if their sittings were extended eight or ten weeks beyond the sittings of the inner house, I think one of the lords ordinary might be dispensed with.

1223. Were not the forms of proceeding much more cumbrous in 1810 than at present?—They were much more cumbrous, certainly; a decision of the lord ordinary was allowed to be twice brought under his own review, and a decision in the inner house could also be brought twice under the review of the innerhouse.

1224. Sir *W. Rae.*] Might not it be brought oftener under review?—Yes, till two consecutive decisions to the same effect were obtained.

1225. Till two consecutive decisions upon the same terms were pronounced, the parties might go on without end?—Yes.

1226. Mr. *Wallace.*] In such a case, how many days would you propose for each lord ordinary to sit?—I think the present arrangements are as good as any, if he is not to sit more than four days a week.

1227. Is there any reason why they should not sit every day of the week?—Monday is required by some of the judges for the trial of causes in the Justiciary Court.

1228. Dr. *Stock.*] How many judges are required?—Three are a quorum in the Justiciary Court.

1229. Do they sit every Monday?—No, of late years, but very frequently.

1230. It is a day appropriated for that business?—Yes, because it is the only blank day of the Court of Session.

1231. Mr. *Wallace.*] Do the lords ordinary belong to the Justiciary Court?—Some of them do.

1232. When they are taken away to attend that court, does not that interrupt their business as lords ordinary?—Certainly; of course they cannot sit in the Justiciary and the Court of Session at the same time.

1233. In point of fact, have the lords ordinary been abstracted from the business in their own court and sat in the Justiciary Court immediately previous to the breaking up of the court?—Yes, both then and in the beginning of November.

1234. Was it in consequence of any want of judges belonging to the Justiciary Court that they so sat?—No, for the judges of the Justiciary Court belonging to the inner house might have been in their place; I believe they were not engaged in court at least.

1235. It has been frequently reported in Scotland, that the suitors have not confidence in the judges reading their papers; does your opinion coincide with that supposition, that the quantity of papers is such, that the judges are not in the habit of studying those papers sufficiently?—I have heard it alleged, that one or two of the judges in the inner house are suspected of not reading their

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papers, from their apparently being ignorant of facts, when the cases came to be advised in the inner house, which they must have known had they read them; but I have no means of knowing whether they read their papers or not.

1236. Is it your impression, and that of other professional men, that their papers are studied by the judges in private?—Certainly; I believe that the greater number of judges study their papers in private.

1237. Mr. Serjeant *Jackson*.] Have the judges at one and the same time the returns of a good many records before them?—A great number; on the 1st of January, when the return was made, the two chambers must have had the papers in 78 cases.

1238. That being so, may not that enable you to account for the judges, in a particular case, not being apprized at the moment of the facts of that particular case?—There is a roll put out, two days before, of the cases that are coming on for advising.

1239. May it not happen that the judge may have carefully read the papers, and made himself master of them, and yet, by a confusion of the causes, forget at the moment the particular facts of the case before him?—No doubt.

1240. Is that not a more charitable mode of accounting for it than to say that the judges neglect their duty in not reading their papers?—I have said that in general they read the papers.

1241. But in the particular case you are putting would it not be more charitable to suppose that at the moment the judge had forgotten the facts of the case, than that he had not read the papers?—It certainly would be more charitable.

1242. Upon consideration, would that be your conclusion?—I do not think people in general draw such a conclusion.

1243. What conclusion do you draw?—I have stated that the greater number of the judges read their papers.

1244. But in the particular instance of the judge not being aware at the moment of the facts of the particular case, what conclusion should you draw?—Though there may be papers of 30 or 40 causes before them at once, they have always full notice; there are seldom more than three cases to be heard and decided at once in the inner house; and, therefore, if it is seen that a judge appears to be ignorant of the facts of a case, the natural conclusion is, that he has not studied the papers sufficiently.

1245. Dr. *Stock*.] Have you ever had occasion, in particular cases, to observe that particular judges are not apprized of the state of facts?—I speak more of the general feeling of the profession and the suitors than from my own personal observation.

1246. Have you ever in any cases, in the mode of dealing with the court business and the counsel employed, observed symptoms of impatience on the part of the judges?—Certainly I have.

1247. Mr. Serjeant *Jackson*.] Can you imagine any human being who has not, some time or other, been impatient?—Certainly not.

1248. Must not circumstances arise in the course of the transaction of business, by counsel addressing perhaps irrelevant matter in a particular case, which would naturally make a judge impatient?—Yes; sometimes the counsel occupy far too much of the time of the judges in the pleadings.

1249. Do you impute to the judges, as a matter of blame, those instances of impatience you have referred to?—I think they might have heard counsel more patiently than they seem inclined to do.

1250. Can you mention any case where a judge has been reprehensibly impatient?—I speak of the general impression; I cannot point out any particular instance.

1251. Would you be surprised at hearing it alleged, as a matter of complaint, that the judges seemed too well apprized of the facts of the cases?—I have heard it complained of, that they make up their minds upon the papers, and are not sufficiently inclined to listen to counsel, and that the papers under the present system are too short to enable the judge to form an opinion upon the case.

1252. Do not you think that the judges in Scotland are placed in rather a difficult position, when they have the public imputing to them, at one and the same time, that they come to court too well apprized of the facts, and their minds made up, and on the other hand, that they do not read their papers?—Certainly.

1253. *Chairman*.] Does it not appear to your mind, that the difficulty arises from the Act of Judicature having curtailed the length of written pleadings, and the

the judges of the Court of Session not permitting a sufficient length of time for the oral pleadings that ought to have been carried on in court?—Certainly; under the old system, besides the condescendence and answer, there was a long written argument in the shape of a petition against the judgment of the Lord Ordinary, which was followed by long argumentative answers, amounting, in many cases, to perhaps 30 or 40 or 50 pages on each side; in short, a long written debate.

Mr. J. J. Darling.  
30 March 1840

*Mercurii, 1<sup>a</sup> die Aprilis, 1840.*

MEMBERS PRESENT :

The Lord Advocate.  
Mr. Ewart.  
Sir Charles Grey.  
Sir Robert Harry Inglis.  
Mr. Serjeant Jackson.

Sir William Rae.  
Dr. Lushington.  
Dr. Stock.  
Mr. Wallace.

THE HON. FOX MAULE IN THE CHAIR.

*John Hope, Esq., Dean of Faculty, called in; and Examined.*

1254. *Chairman.*] YOU are Dean of the Faculty of Advocates in Edinburgh?  
—I am.

*John Hope, Esq.*  
1 April 1840.

1255. And you have been in considerable practice for some time in the Supreme Courts?—Since I was made Solicitor-general, in the year 1822.

1256. Is it your opinion that the business before the Court of Session has been increasing or decreasing of late years?—I would beg to state, that I have not looked into returns upon the subject, but, from my knowledge of the court, I should certainly say, that, for the last three years, perhaps for the last four years, there has been a decrease, with the exception of the latter part of the last year.

1257. Has that decrease of business been of such an extent as, in your opinion, to warrant any reduction in the number of judges?—In no degree whatever; it is one of those fluctuations that occur in all countries, and in reference to all courts, I presume; I rather believe that I have heard the same observations made in reference to some of the English courts in the last two years.

1258. *The Lord Advocate.*] You cannot trace it to any cause of permanent operation?—To no cause of permanent operation, and to no cause, I should say, of a description worthy of attention, except one, which I do think deserves some attention, but not a permanent cause.

1259. *Chairman.*] What is the cause which you refer to?—I allude to the effect of the very extensive changes made in the system of pleading, introduced in the year 1825; in consequence of the recommendation of the Law Commission, of which I was a member in 1823, a new system was introduced, which it became necessary to lay down with very considerable precision in the Act of Parliament, which was attended therefore with the inconvenience, to a certain extent, of preventing the court adapting the system, as they might otherwise have done, more to the character of the different cases, and to the magnitude of the cases; it was a system irrespective very much of the importance of the cause; it was found to be very cumbersome, at least for a number of unimportant cases; and, being new in itself, it gave rise to a great number of discussions upon points of form, and to a great many blunders in the preparation of cases in reference to the new forms, by which many of them were lost; it led to a great deal of expense and a good deal of vexation, of which litigants complained, and, until the system had been in operation for six or eight years, it unquestionably produced the feeling that there was considerable uncertainty as to the form, and a good deal of preliminary expense, arising from those changes; that, again, is a thing which will gradually correct itself, of course.

1260. *The Lord Advocate.*] Your opinion is that the statute was rather too rigid?—The statute was too rigid, and affords an illustration of the great danger of regulating the forms of courts too accurately by means of Acts of Parliament; a committee of the Faculty have been in communication recently with some of the judges, with a view to simplify and improve and shorten some of these forms; the reason why the forms have not been altered is, very much, a doubt being entertained whether, in consequence of the clause in the Act of Parliament, so much can be done as could be wished.

1261. *Dr. Lushington.*] Can you state any particular instance of objection to the form which was introduced in 1825?—I do not state an objection to the form;

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I state

John Hope, Esq.

April 1840.

I state it as almost the necessary consequence of the very great and extensive change in the system of pleadings in the court.

1262. You do not think the system introduced in 1825 is erroneous at all?—Not in the least degree; there are parts of it that are more cumbersome than it might have been, and parts susceptible of improvement; but the principle of the change introduced I concurred in as a member of the Commission.

1263. The *Lord Advocate*.] Acting upon the principle of the improvement introduced, you think that if the court had had more power, the court might have adapted the forms to the different cases which arose?—I think so; at the same time, in the course of time the thing will correct itself; there are other causes which I think have had a considerable effect during the last four or five years in producing that decrease that I allude to.

1264. *Chairman*.] Did the profession and the public in general anticipate an improved system of dealing with causes before the court from the Judicature Act, in consequence of the change from so much written argument to oral pleadings?—Certainly, and the improvement has been very great and very extensive.

1265. Has it gone to the extent, in your opinion, that the profession and the public expected?—For the last five or six years, I should say, the improvement has been so great that I think it has gone to the extent, generally speaking, that we would desire; I think that during the last five or six years there has been a very great change; the number of written arguments has greatly diminished within the last five or six years; and I think the reduction of them has been carried to an extent beyond what is altogether expedient, assuming what the system does, and which is my own decided opinion, that in difficult and important and subtle and intricate causes a printed argument is a very deliberate and useful mode of assisting the judges in the consideration of weighty causes.

1266. And it would naturally, in the course of things happen, that in the progress of time the court will be more fully occupied from hearing in court oral pleadings than they were formerly accustomed to be when they took all in written pleadings and studied them at home?—The system was totally different from that which prevails at present. Formerly the senior counsel made a few remarks upon any thing that had occurred to them supplementary of the printed argument; but the judges were expected to consider the papers beforehand, and to be prepared to deliver their opinions at length when they came into court; and it was very rarely, of course, that it could be expected that counsel would shake them in those opinions, or that they could be expected to reserve their opinions with a view to the discussion which might take place in court. Now, there are very few cases indeed which go into the inner house upon printed arguments; it would be easy, I suppose, to ascertain; but the proportion is very small, and every case that goes into the inner house in review from the Lord Ordinary, is opened to any extent the counsel choose, but the judges look at the cases beforehand. When the system first came into operation, they had been previously accustomed to consider the printed argument and the statement of facts privately at home, before they came into court, with a view to make up their opinions, and that appeared to continue to a considerable extent for some time after the new system was introduced. It was the subject of observation, and as the Committee, I believe, are aware of a statement by myself to the Law Commission in 1833,—I stated the matter in a way which shows sufficiently that I can have no reserve in giving any opinion in relation to the conduct of business in the court. I stated then what occurred to me without any reserve; I should wish, however, afterwards to explain the circumstances in which that happened to come before the public; I stated then what occurred to me in regard to the practice which then prevailed. I think that that gradually has corrected itself. I beg to observe that some judges, quicker men, men more of decided minds, from the glance or view they take of the record, may receive more of an impression before the case is argued than others, but I myself have not seen any reason to complain at present that the public is at all prejudiced by that study of the papers in a way to cause any embarrassment. There are many causes which you cannot look into in the smallest degree, when the records and papers are printed and placed before you in order that you may know what it is about, without your forming a decided opinion; and if there is any drawback at all to the present system, it arises, I should say, in no respect from the way in which the case is heard in the inner house, but from the circumstance that of late years there has been introduced—what was not the practice when the system of records first came into operation—a very useful and natural practice by the lords ordinary

ordinary of accompanying their judgments by very long and argumentative notes—a very natural and very conscientious thing on their part to do, but the benefit of which I have always thought extremely doubtful, both to the judgment which they pronounced, and likewise the mode in which the case was to be heard in the inner house; because, if you have from my Lord Moncrieff, or Lord Jeffrey, or any other lord ordinary, a long argumentative statement of the grounds of the judgment, with a discussion of the whole questions of law or fact, that must produce an impression, and ought to produce an impression, upon the mind of any judge who looks at it, against the party who has to reclaim against that judgment. There is only one other course that could be adopted different from the present, which in 1833 I suggested to the Commission, namely, that the judges should hardly look at all at the printed records, and that the causes should be opened, as they are in the House of Lords, to judges wholly ignorant of the subject. Subsequent experience and subsequent reflection have perfectly satisfied me that that would be a very useless consumption of time without any adequate object to be gained. I think a previous knowledge of the case is of the greatest possible importance, carried to a certain extent. There are very few of the judges now who, so far as I know, study the authorities with a view to form any opinion upon the case before it comes into court; I know from repeated and constant communication with many of them that they do not.

1267. Sir *R. H. Inglis*.] Can any degree of knowledge, as distinct from opinions, be conceived too great for a judge to carry into court, with reference to the case to be argued before him?—Yes, I would say that it may, because I do not think that a judge is fully competent to see the bearing of facts, or to follow the consequences of facts, or the combination of facts, without hearing parties, and therefore I do not wish even the facts to be studied by a judge, so as to satisfy his own mind what the true state of the facts is. I think it is right that he should know the nature of the cause, the nature of the pleadings, the nature of the averments on both sides, and look into those pretty accurately, but not to ascertain and fix what is the result of the averments of facts in reference to either the contradictions or admissions of the party's pleadings, or in reference to the documents (which are also all printed) to which the parties respectively refer.

1268. Dr. *Lushington*.] But is it not desirable that the judge, provided he does not form an opinion upon the case, should be as accurately informed as possible, both as to the points of law likely to arise, and the evidence which is about to be discussed; will not he be able more easily to comprehend the arguments of counsel from such previous preparation?—I would fairly say that I think that may be carried too far, and the very opinion which I gave to the Law Commission in 1833 unquestionably proceeded from thinking that it might be carried too far, and had been carried too far. I am quite satisfied, generally speaking, with the manner in which it is done at present.

1269. But it could only be carried too far by a judge forming a previous opinion in his own mind?—The very impression produced by a full and anxious and conscientious attempt to master the facts of the cause, very often necessarily decides what the opinion will be, and I should wish undoubtedly to have an opportunity of making my statement upon the facts, without thinking that the judge had formed his opinion as to what the facts of the case truly were, although it is desirable that he should have a general acquaintance with them. Attention must, of course, be paid, in considering the Scotch system, to the constitution of the Scotch court, and the object of the divisions of the judges into ordinaries, and into two divisions; I believe there is no court that exactly has any part of it constituted upon the same principle as the duties allotted to lords ordinary in the Court of Session; the only thing at all analogous to it, but it would tend to mislead to refer to that, is what lately has been introduced into England in comparatively unimportant matters, with regard to motions made before one of the common law judges sitting in chambers or Bail Court. The great object of the lords ordinary is first to superintend the preparation of causes, and secondly, after hearing the parties fully upon every thing that arises upon the cause, to bring the case to a point. It very often happens that in the outer house a case occupies an immense deal of time, leads to a great deal of discussion, the discussion of a great many questions of law; and in the result every one is satisfied, or the Lord Ordinary is satisfied at all events, either that one point must be determined first, or that the cause turns upon one question, and one question alone; he gives his judgment upon that, and puts the case into shape, and brings his judgment to bear upon the real point in dispute; a case that has occupied an immense deal

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of time in the outer house is in that way so simplified and so shortened, that when the inner house comes to consider the judgment, they have only to consider whether that particular judgment is right or not. If they differ from the Lord Ordinary it is sent back to the Lord Ordinary, and he must decide a point that he thought was not important, or which is superseded in the view he took of it. Then, again, the lords ordinary do not form a separate court, and the divisions are not considered as a court of appeal in the smallest degree. If a party wishes to have an opportunity of having the judgment considered, it is but a movement in the cause from the Lord Ordinary to the division; and the principle of the court undoubtedly is, that when you come before the division, though, no doubt, you must satisfy the court that the judgment of the Lord Ordinary is wrong, you are not in the situation of making an appeal as from the judgment of the Court of Session to the House of Lords. You are in the situation of exercising what the constitution of the court supposes you to have as a matter of course, in the ordinary daily despatch of business, in the great multiplicity of causes, viz., to have your case heard and considered by the judges of the division. It is not moved before the division by a new writ, or any thing of that kind; it is in the form of a printed motion, but it is carried to the division, if you wish it, as a matter of course. It is not intended or supposed, in the constitution of the court, that the parties are to be satisfied with the judgment of the Lord Ordinary as with the judgment of a separate court; and I think that those very long notes are partly written in a misapprehension on the part of the Lord Ordinary, in supposing that that is ever likely to be the case.

1270. *Sir C. Grey.*] Is it competent to the court to make the judgment of the Lord Ordinary final?—No, it is not competent to the court.

1271. *Mr. Serjeant Jackson.*] In fact, then, it is a stage of the cause?—Yes, it is; and it will never happen that any great proportion of cases will remain upon the judgment of the Lord Ordinary; it is not the intention or the principle of the constitution of the court at all; if the parties are satisfied, of course so much the better; but it is not the principle upon which the court is based.

1272. *Dr. Lushington.*] The judgment of the Lord Ordinary is final if there is no reclaiming note by either party?—Exactly; but it is not competent for the court to make it final.

1273. *Sir C. Grey.*] If both parties acquiesce, it is final?—Yes; or if the party against whom it is pronounced acquiesce, it is final.

1274. *Mr. Ewart.*] The question put before was, whether it is a mere stage of the cause; but is it not more than that, as it may be final?—It may be final, if the parties acquiesce in it.

1275. *The Lord Advocate.*] The Lord Ordinary has the full powers of the court for the decision of the cause in the first instance?—He has; he is not in the least degree subordinate to the court. He is not an officer of the court, like the master in chancery, though he does perform a great many of the duties that are devolved upon the master in chancery; so do the inner divisions. But he has the full power of, and his judgment is the judgment of the Court of Session, if the parties do not wish to have the opinion of the division upon it. He cannot prevent it if they so wish, neither is it the theory or the practice of the court to view the step of the litigant in carrying it before the inner house as an appeal, in the shape of carrying it from one court to another. I have stated, in my evidence before the Law Commission, to which I understand the Committee have been referred, that I thought then, seeing that the change had not taken place in the habits of the judges to the full extent to which I had wished, that it would be better to have the case opened, as in the House of Lords, with the judges almost entirely ignorant of the matter. I am quite satisfied now that that is a mistake; we have had a variety of cases in which the judges at the request of the counsel have taken that course. In one or two cases I begged the judges beforehand to try that, and not to read the cases at all, and it has led to a consumption of time that is really quite disproportionate; I should say, an actual loss of time. There is one case this year in which I am perfectly persuaded six or seven days would have been saved to the court, if we had not unfortunately asked them to take that course.

1276. *The Lord Advocate.*] Those were cases of long proofs?—Yes they were, some of them.

1277. *Chairman.*] Then the Committee is to understand that, from further practical experience before the Supreme Courts, you have seen reason to change the opinion which you gave before the Law Commission in 1823, namely, that it would be better that the judges of the inner house should in court, for the first time,



time, be made acquainted with the case by full *viva voce* pleading in court, and that then they should deliberately study the case at home?—Certainly I have modified that opinion to a very great extent; I am satisfied I was wrong to the extent to which I made the suggestion at that time. With reference to the questions that have been put to me now, and with reference to the statement before the Law Commission, as the opinion of the Law Commission upon the subject concurs with the evidence that I have stated, and embodies that evidence, I wish to add what I stated at the time to the Commission, and particularly to a member of it, the late Mr. Jamieson, who drew up that part of the report, I never thought that that point was a subject for public discussion. In the course of my examination before that Commission, some conversation arose upon the subject, and the members of the Commission stated to me that they thought it would be a very good mode of giving a hint to the judges in the shape of a statement from me. A separate question was then put to me. I made the remarks, understanding, undoubtedly, that they were to be communicated to the judges in the first instance; I thought it was not the subject for public observation, in the least degree. Then, some time afterwards, the late Mr. Jamieson told me that the Commission wished to include my statement in the report, and to embody that statement of mine. Of course, I said that any statement I made at one time they were at liberty to make use of in any other form, but that I did not think that was a subject upon which to make a report to the Crown, or to be made the subject of public examination; that they should ask an interview with the judges about it, and should state that they wished some change made in that respect in the practice of the court. Some objections were stated to me by Mr. Jamieson in reference to that course, which were not satisfactory to me; I stated that if they wished to use that evidence, they might do it if they chose, but I did not think the matter was one that required public observation or to be noticed publicly; that it had not proceeded to such a length as to require that, and the matter has so corrected itself since, that I have no ground of complaint at all to make. I hope I may be allowed to add, as it appears that the evidence has been referred to, that I never desired by it to countenance in the House of Commons in the smallest degree the notion that there was impatience on the part of the judges in hearing statements. I never meant to countenance any such notion at all; I do not think that that is exhibited by the divisions. I was not aware that a complaint existed at the bar at this present moment upon the subject. I am quite aware that different counsel take the proper and necessary interruption by judges of counsel differently; that depends upon the constitution of people's minds, and it depends upon the length to which people speak; I am, I believe, a very long and anxious speaker, and I do not consider myself a particularly patient person; others may be more impatient than I am; other counsel are more put out by interruptions. There are those qualities of the mind which lead some people to think that judges ought not to speak to each other about the facts of the case while the case is going on; I do not consider that an interruption. There may be many instances in which, at the time, I think I am unnecessarily interrupted, and the moment I come to reflect upon it, I am perfectly satisfied the interruption was right. In the manner in which the cases are heard in the inner houses at present, there is a circumstance which I think will best show whether the bar generally have the feeling that is supposed, and which I saw was stated with reference to my evidence, which is this,—the rule of the court is, that in bringing a case before the divisions, either the senior counsel for the reclaimer opens the case, in which case there are but three speeches; the respondent then answers him, and the same counsel for the reclaimer replies, which closes it, unless with the special leave of the court: or on the other hand, if it is a case in which you wish more pleading, the junior opens; then the junior for the respondent answers, and he is followed by the senior counsel in each case successively: now, it very frequently happens that the senior counsel desires his junior to open in important cases; one member of the bar, a member of this Committee, more frequently desires his junior to open than not; now, if there was any difficulty in the junior counsel being heard, I do not think that that practice would prevail. It cannot be with a view to the tactics of the case in any cause that the junior should open, because you give the final reply then to the respondent, there being then four speeches whilst there are only three in the other instance.

[1278. Mr. Serjeant Jackson.] I understand it to be your opinion that there is no ground of imputation on the Scotch judges of their exhibiting impatience in the hearing of causes?—Most assuredly not; and I should be very sorry if those

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remarks that I made to the Law Commission were supposed for one moment to convey or justify that imputation; if I thought so, the very freedom with which I made those remarks would show that I should state it without any hesitation or scruple.

1279. What is your opinion with regard to the impression of the body of the bar at large; do you think that it is the prevalent feeling of the bar that there is an improper degree of impatience exhibited by the judges?—I do not; at the same time you are quite aware that in proportion to the care with which a cause may have been previously studied at home, especially with a view to master the facts, that will necessarily lead, when there are several judges sitting, to those indications and expressions of opinion thereby formed which practically seems to be an interruption, and which practically may shorten, and usefully, the statement of counsel to a very great extent; I do not consider that to be impatience.

1280. Do you imagine that there is, amidst the community at large in Scotland out of doors, an impression of that kind, unfavourable to the judges, that they are impatient and do not hear counsel properly?—No, not that they are impatient and do not hear counsel properly; I think, on the other hand, that one reason for the opinion I gave in 1833, and for my stating that more strongly than Dr. Lushington seems to coincide with me in, is, that the tendency of that reading and of such indications of opinion formed previously, is of course to make the losing party dissatisfied that the judge has taken up that impression previously; because I freely own that I do not much see the use of that laborious study of the case, previously, to which Dr. Lushington refers, if it is not to have the effect of shortening the time that is consumed by unnecessary speaking in court. I should certainly prefer the course that is now followed in Scotland to that before the House of Lords, if the papers are also to be carefully read beforehand; and as far as I have ever been able to see of the practice of the Court of Chancery, I believe it would do more than any thing else in the diminishing of arrears and expediting the business, if their pleadings were printed and a certain degree of knowledge were acquired by the judge before the case were opened by counsel in court, where the whole evidence seems to be read over, and a great deal of time very uselessly occupied, as far as I can judge of it.

1281. *Mr. Ewart.*] Do you think that the previous formation of opinions which you attribute to the judges from the study of the cases, is the consequence of former habits existing before oral pleading was introduced to the same extent that it is now?—The question rather assumes that the opinion is now formed, which is a great deal more than I have stated, or than I can at all admit; no doubt the practice of studying the causes originally has its effect still upon some of the judges who have been many years conversant with a different system, but to a degree that is hardly, if at all, now to be complained of or noticed.

1282. *Chairman.*] Is the mode in which the judgment is delivered in the inner house at present considered satisfactory to the public and to the profession with reference to the extent to which the opinions of the judges are made known upon cases?—I stated in that part of the evidence which has been referred to before the Law Commission, that I thought at that time the opinions were too shortly given; I think that has been, to a very great degree, corrected; I am not aware that there is any reason at present to complain. I think that the Scotch courts have been somewhat unfairly treated in the House of Lords of late; complaints are made that the opinions are not stated at length by each judge, and in considerable detail, as if the court were bound to consider and dispose of each cause in the knowledge or in the supposition that it was to be carried to appeal, or at a length not required by their own views of the cause, or in their own intimate knowledge of Scotch law. I should think that the presumption is, where the opinions are shortly given, that the judges had a decided opinion, and that rather more weight should be given on that account to their judgment. The judgments are given now very much with reference to the notes of the Lord Ordinary, in which, if the judges concur, the opinion is in that form; and it would be very useless for each judge *seriatim* to be going over in detail the grounds that are stated in that note. If, on the other hand, they differ in the grounds assigned but concur in the judgment, it is enough for them to point out the ground upon which they do go, and not to enter further into the case than saying that they differ from the Lord Ordinary in some of the grounds that he has assumed for the reason of his judgment. There have been some causes sent back from the House of Lords to be argued by the full court, because the grounds have not been stated by the judges, leading to a useless consumption of time; and the result was, in one lately,

lately, that there was only one judge differing from the remaining 12 in the judgment that had been originally pronounced; but we sat two days hearing the opinions of all the judges delivered *seriatim*, because the House of Lords wished it; and I did not hear one new reason added to the reasons contained in the shorter opinions of the first division as originally given.

1283. You stated to the Law Commission, that in consequence of the full note given with the decision of the Lord Ordinary, and the more abbreviated one in the decision of the inner house, many cases have been entered in the reports in which the note of the Lord Ordinary must in future form the law of the case when subsequently confirmed, though it was manifest at the time that the court went on different grounds; do you adhere to that opinion still?—I think that opinion is not now applicable to the practice of the court; the change that has taken place during the last five or six years, in consequence of the judges becoming more habituated to the exigencies of the new system, is as great as it is possible to represent; and I desire to convey that as my deliberate conviction as strongly as I conveyed to the Law Commission my opinion of the state of things then. When the judges of the inner house differ from the lords ordinary in the grounds of the judgment, but concur in the result, they are in the habit of pointing out the grounds of that difference. I do not think that it is any great advantage that judicial opinions should be long.

1284. With regard to the constitution of the inner house, does it occur to you that the business that comes before the two divisions could be more satisfactorily transacted by those two divisions being formed into one, with a reduced number of judges?—No, certainly not; I am very decidedly of opinion that one division could not overtake the business of the country, and I am also of opinion that there are a great many public advantages in having the court divided into two divisions.

1285. Then, preserving the two divisions of the inner house, will you state to the Committee whether you see any particular advantage in altering the number of four judges to each of the divisions?—That was a change which was proposed by my right honourable friend and former colleague, Sir William Rae, when I was in office, and I concurred undoubtedly in recommending the change, though, I believe, with more hesitation than he had upon the subject; I fairly own I am now somewhat doubtful whether it was an advantage to reduce the number of the judges of the inner house to four, and, after the experience we have had, I fairly own that I would prefer the number of five, and I think that might be attained without an increase of the future number of the judges of the court.

1286. Would you obtain that increase by taking judges from the outer house, and increasing the number of the judges in the two divisions of the inner house?—The change could not be made without an Act of Parliament, in the first place. I would not diminish the number of lords ordinary at all; the plan that has occurred to me several times in the course of the last five or six years would certainly impose a considerable labour upon some of the lords ordinary, and therefore would most assuredly be attended with very great inconveniences on the other hand, and in all probability with an interruption to the business of the outer house which would counterbalance the advantage to be obtained, which would lead me to recommend the plan, and probably renders it wholly impracticable without increasing the number of judges. At present the system of the lords ordinary, as the Committee are aware, is, that they remain in the outer house till, by the death of one of the judges in the inner house, or his resignation, they are removed into the inner house. In that way the judges of the same court are, many of them, for a series of years doing a different kind of duty, and the practice, in matters of form and a variety of other things in the outer house, may come to vary very greatly since the judges who compose the division have been in the outer house. I think, therefore, it would be of importance that there should be one of the outer-house judges sitting with the other four. The difficulty, of course, is to obtain that consistently with the duties which the lords ordinary have to perform; that, perhaps, might be done by taking them in rotation, say one lord ordinary sitting with the division reviewing the judgment of another lord ordinary; it of course takes him away from his duties in the outer house, and during that period it would be a very serious interruption to his business, and to some of the judges would of course add to the great arrears of causes that are necessarily before them; at the same time, I should be very glad if, by any exertion on their part, it would be possible to have one of the outer-house judges sitting in that way in the inner house; but I believe with the present number of judges it

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is quite impossible. I do not mean to say that that is a plan that I have that confidence in that I would by any means propose it, but the question being proposed to me as to my opinion, I do not think it my duty to withhold any opinion which has occurred to me from my practical experience in the court.

1287. *Sir W. Rae.*] According to the practice at present of the judges in the outer house, have they any opportunity in the course of a great many years, except upon very rare occasions, of delivering an oral opinion upon any case?—The attendance of the bar and the public in their courts is so small, that you cannot call it an opinion in public; the rooms are so small that there cannot be more than 20 or 30 persons in them at the same time, and, except the note accompanying their judgment, any other opinion is but an incidental opinion; I think that certainly is a disadvantage to them.

1288. Do the judges feel that?—I think they do; I think it would be a matter of considerable moment if they had an opportunity of sitting in the inner house, and that it would be some advantage to the judges in the inner house if they had the benefit of the outer-house judges in matters of form; for example, granting diligences for the recovery of writings, which in a great deal depends upon the stage of the cause in which it is granted, and in which it is not easy sometimes for the inner-house judges to review the interlocutor complained of without the aid and information of an outer-house judge as to the practice and views that prevail in the outer house upon the subject.

1289. Do you think it would be possible to obtain that, preserving the number of four, by one of the judges of the inner house doing the duty of the Lord Ordinary, and allowing the Lord Ordinary to come into the division on particular days?—No, I do not think that would be advisable; and if it could not be done (of which I am extremely doubtful) with the present number of lords ordinary, then I beg leave to say, as I stated to the Committee of the House of Commons in 1834, that that would only confirm the opinion I then expressed, that I was wrong in concurring in the reduction of lords ordinary to five, and in the abolition of two judges in the Court of Session. I think, that, along with a member of the Committee, my former colleague, we erred in making that reduction; I was satisfied of that when I gave my evidence in 1834 to the Committee of the House of Commons, and if this change could not be made with the present number of lords ordinary, that would confirm the opinion that we erred in reducing the number of judges to 13; I stated that opinion in 1834; all subsequent experience has confirmed it.

1290. Do you remember whether the report of the Commission, upon which the Judicature Act proceeded, contemplated a reduction of the number to four?—I do not remember whether it was noticed in the report of the Commission.

1291. *Sir C. Grey.*] What is your opinion of this modification in the distribution of the business of the Court of Session, which would be in its main features an approximation to the division of labour in Westminster Hall; that there should be three divisions of the inner house of four judges each; that the three senior judges should each be chief of one of those divisions of the inner house; that the nine of the other twelve judges sitting in those divisions of the inner house should sit both as lords ordinary and as judges in the inner house; that the review of a decision of the Lord Ordinary should not be carried to that division in which he sits, but to either of the others; and that the 13th judge should have the occupation or the employment of revising, amending and suggesting alterations of the acts of sederunt, and hearing questions that arose upon the construction of the acts of sederunt, or the application of the acts of sederunt to the questions that arose; and that in addition to that, the judges, independently of the three who sat as chief of the three inner divisions, should choose, beginning with the seniors of the division in which they should sit, and that the judge to whom the business of revising the acts of sederunt was confined should be appointed by agreement among the judges, that they should select among themselves one who was most adapted from his peculiar habits for that duty?—I have no difficulty in giving my opinion upon every branch of that question; I have not the least hesitation in saying that I think the plan is objectionable in every part of it. In the first place, I think the separation of the court into three divisions would create a greater number of courts than is at all advisable or necessary. In the second place, I think the plan proceeds upon reverting to the old system, which was laid aside, of not having permanent lords ordinary, the value of which, in the general opinion of the profession, has been greatly increased by the change of pleading that was introduced in 1825.

1292. In

1292. In what way would it have that effect?—Because the question suggested that each of the judges, except the chief judges in each division, was to act as lord ordinary; therefore all the judges would be lords ordinary except the three chiefs.

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1293. They would be equally permanent?—What we mean by permanent lords ordinary are those who are never brought into the inner house, except by the death or resignation of the judges in that house; that ambulatory system of all the judges acting as lords ordinary was found to be extremely embarrassing and very inconvenient; it led to great delay in the progress of the cause, the judges being sometimes in the outer house and sometimes in the inner house, and the only disadvantage attending the present system of lords ordinary is, that they are not in the inner house; in every other respect the system to which I have alluded is a great improvement. In the next place, the plan involves the devolution upon one judge of questions, that, I should think ought equally to be considered and decided by the whole, and many of which are perfectly inseparable, in my apprehension, from the particular cause in which they arise, which I should be sorry to see devolved upon one judge alone. If they are made abstract and general questions, not arising out of the individual cause, I do not think that you could ever make a sufficient number of abstract points of form that would occupy the time of a judge. I am ready, if it is desired, to state my objections on further parts of the plan. [*Sir C. Grey said he did not wish it.*]

1294. You are aware that the judges in Westminster Hall sit *in banco* in the court, and that they also sit singly in the Bail Court, that is, the puisne judges, and also in chambers, that they transact a great deal of the business that is transacted by the lords ordinary in Scotland?—I said, in my former answer, that the only thing in the least degree analogous to the business of the lords ordinary was the duty of the judges in England done at chambers, but that a reference to that would tend to mislead; and I rather think that the remarks now made, according to my knowledge (which is very limited) of the practice in the English court, shows that it does mislead, for there is no such analogy as would tend to recommend that part of the plan in the least degree, or to remove the difficulties which I have upon the point.

1295. Mr. Serjeant *Jackson*.] Do the lords ordinary hear causes together, or does each lord ordinary hear a particular cause apart from his brethren?—Each lord ordinary superintends the preparation of a case from the time the first writ, the summons and the defences come before him; he alone hears and decides all the questions which arise in that cause; he has no communication with the other lords ordinary at all; it is his individual duty, his individual judgment; they have each a separate roll, and have no more concern with the causes before the other lords ordinary than if they were sitting in separate courts entirely, unless they are ultimately consulted by the division with all the rest of the judges.

1296. Each lord ordinary has a separate court, and sits apart from the other lords ordinary?—Yes, in that respect; though he has not a separate court so as to make his judgment an appeal from one court to the other, his judgment is the judgment of the Court of Session; but he has no connexion with the other lords ordinary in the discharge of the business in the outer house.

1297. Is it competent for a suitor to go before which lord ordinary he pleases?—It is competent for a party to choose which lord ordinary he will go before; but the cause must continue before that lord ordinary from the beginning to the end. We have considered that choice on the part of suitors as a most important and valuable principle in the Scotch courts; we think that it leads to very considerable check upon improper appointments of judges. No doubt to a certain extent it operates unjustly; there is a caprice on the part of the public in choosing one lord ordinary in preference to another. Sometimes if the Lord Ordinary is a very strict formalist, and on that account a most excellent judge, he may become unpopular with agents and suitors; there is a great deal of caprice in it; it leads to a very unequal division of labour, but at the same time it is a popular principle that we have always contended for, to which the bar and the profession and the public attach very great value, and which I should be very sorry to see interfered with in the smallest degree.

1298. Would it tend to the preventing of delay to the suitors generally if there was a greater distribution of business amongst the lords ordinary?—No doubt it would, because at times one lord ordinary has infinitely more to do than others, and of course in that way you would compel a number of causes to be brought before a lord ordinary before whom they are not brought at present, and therefore prevent arrear.

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1299. *The Lord Advocate.*] But suppose the business were distributed among the different lords ordinary according to any system which could be introduced to equalize the business; is it your opinion that the number of lords ordinary according to the present constitution of the Court of Session could be reduced, and at the same time the business be effectually done?—Most assuredly not; I do not think the question so much depends upon the distribution of the business before them. You are necessarily exposed to arrears on the one hand; but I rather think it would be found that it would be more difficult to get through the business if you distributed it.

1300. *Sir W. Rae.*] Parties have not only the right to choose the lord ordinary, but to choose the division of the court to which to appeal in the event of being dissatisfied with the judgment of the Lord Ordinary; has that been a recent regulation?—Yes.

1301. Is that calculated to increase the arrear of causes before particular judges in the inner house?—It was objected to unanimously by the bar at the time it ultimately took place; I thought it an unadvisable change, and I saw no reason for it; it is enough that the suitor is allowed to choose his lord ordinary, and I think this is attended with many inconveniences, and certainly it would prevent the possibility of that plan which I have suggested, namely, the lords ordinary being called in in rotation to sit in the two divisions, because in that case you could not tell to what division the cause would go; they could not arrange the business to enable them to sit, except in review of their own judgments, which I think an unsatisfactory mode. I do not see that the particular arrangement in question leads to increase of arrears, except before some of the lords ordinary.

1302. Formerly certain of the lords ordinary were attached to each of the divisions, therefore, in choosing a lord ordinary, the parties would take into consideration the division to which he belonged?—I would not say that at any time the choice of the division was often looked upon as an important thing; I think the choice of the lord ordinary was always the important thing; no doubt to a certain extent it might influence parties, but I think the choice of the lord ordinary was the material thing looked at.

1303. In the case of a party not wishing to have his cause appealed to the first division, might not that be a reason for his choosing a lord ordinary attached to the second division?—No doubt it would, but the proportion of cases in which that would operate would be so small that I am not aware that that would tend to increase the arrears before either of the divisions; I think it objectionable upon larger principles than the question now put to me refers to; at the same time it has been in operation only a year, and therefore I do not mean to say that I ground my opinion upon any observation as to the working of it.

1304. *Mr. Serjeant Jackson.*] Is there any great disproportion between the number of causes instituted before the Lord Ordinary who has the greatest quantity of business and the Lord Ordinary who has the least?—An immense disproportion at times; I have never paid attention to the statistics of the court, because I do not think that that is a matter that enters into the question as to the constitution of the court, or any of the questions now put to me; and it so happened that I never looked at any of the returns from the Court of Session till the first time I was examined in the year 1834; up to that time I had not seen any returns upon the point; this autumn I saw some returns for the first time in my life in regard to the number of causes before the lords ordinary; I do not know what it might be at other periods in reference to the proportion, but certainly I was not aware of the extent of disproportion till this autumn.

1305. Are you able to give any estimate of the difference in the time occupied by the Lord Ordinary who has the greatest quantity of business and the Lord Ordinary who has the smallest quantity of business?—No, I am not, for many reasons; because, after the inner houses meet, it is very rarely than I can attend the cases in the outer house, unless the judge in the outer house insists upon my going on, after the inner houses have risen, with a reply, jaded and fatigued with the previous work of the day; but it very often happens that the lords ordinary rise before the inner houses do; it must be according to the number of cases.

1306. Do you consider that a lord ordinary, who is a great favourite with the suitors, is overburdened?—There are some of the lords ordinary who cannot get through the business, and before whom there are great arrears, leading to a stoppage in the roll; I presume there are causes at the foot of Lord Jeffrey's roll, or Lord Cunningham's roll, or Lord Moncrieff's roll, that may not be heard for a year and a half after they are enrolled.

1307. On

1307. On the other hand, some of the lords ordinary have a very inadequate employment of their time?—Latterly that would appear from the returns; I am not aware of the accuracy of those returns, or on what principle they are made up. One knows, from experience, and from seeing the rolls that the clerk brings you, that there is a great disproportion; because I find myself in a great many cases before one lord ordinary, and, comparatively speaking, very seldom before another; I know that there has been a disproportion in their business; to what extent I cannot tell.

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1308. Is it your opinion that the disadvantage to the public, from altering this system, by making a more equal distribution among the judges, would be greater than the public advantage in the saving of time, and equally working the judges?—Yes, I should say so; the value of that principle, as increasing the responsibility of Government in appointing judges, is very great indeed, and counterbalances, in my mind, the disadvantage; I state that with all the experience of a public officer. Having had to consider the appointment of judges with my former colleague, I consider the increased responsibility of Government is so decided a benefit, that we should suffer greatly by that arrangement being altered; and, on the other hand, looking to the nature of the duties of lord ordinary, I cannot look upon the selection of lords ordinary in the same light as the selection of the Court of Queen's Bench, or the Court of Common Pleas. The appointment and institution of ordinaries is really in reference to the preparation of the cause: they bring it into shape and form; I think that those considerations afford an additional reason for maintaining that principle of selection.

1309. Are there any other reasons that weigh strongly in your mind, besides that one of preserving the responsibility of Government, for retaining the present system, in preference to a mode of distribution?—Yes; but not in my mind. There has been a general feeling existing in Scotland, at all periods, that it produced great emulation on the part of the judges to distinguish themselves in their judicial duties; that does not weigh in my mind in the smallest degree; I look chiefly, almost exclusively, to the public ground which I have stated; we have considered that a sort of valuable popular principle in Scotland, and I fairly own I should be very sorry to see the suitors deprived of it.

1310. *The Lord Advocate.*] You state that there is a considerable arrear before the lords ordinary; if there was an equalization of business before the lords ordinary, there would be less arrears upon the whole; supposing all that advantage to be derived in the diminishing of the arrears by an equalization of the business, do you think the number of lords ordinary could with propriety be reduced?—Most certainly not; if you were to equalize the business by allocating the causes as they are enrolled before the different judges, I believe that it would be found that there would be a considerable arrear of business before all the lords ordinary. I beg to observe that I stated in 1834, to the Committee, that I thought the number of five lords ordinary was then too small, that the work was consequently not properly done even then, when I should say the disproportion of business was not so great as it is at present; and I adhere to that opinion; I would rather see seven lords ordinary working in the outer house than five; I do not mean to say that I would alter the existing Act, but I stated that, and I adhere to the opinion, that I think we were wrong in reducing the number.

1311. *Dr. Lushington.*] Then, in your judgment, five lords ordinary are the smallest number that could be retained for the safety of the conduct of the business in the courts of Scotland?—Decidedly.

1312. *The Lord Advocate.*] Is it your opinion that one division could possibly overtake the business of the Court of Session?—Most certainly not.

1313. You are aware that the Law Commission in 1833 expressed that there was a great deal of dissatisfaction felt in the country with the way and manner in which causes were heard in the inner houses, as contrasted with the manner in which they were heard in the outer house?—I fairly own that I have not read that part of the report of the Law Commission, or have no recollection of it if I did; I understood that it embodied my evidence with certain observations upon it; those observations I have not read, or do not recollect.

1314. Do you understand that any such dissatisfaction as to the mode of hearing causes in the inner house still exists, either with the profession or the people generally?—Not to any extent that I should say requires to be the subject of any observation or inquiry, or such as weighs in my mind; any habits that have been formed by any of the judges of looking at the cases more laboriously and more conscientiously than others may wish, if at all to be deprecated, will gradually



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ally be removed by longer experience, and of course be entirely removed, in proportion as those judges ultimately die off.

1315. If such dissatisfaction had existed in 1833, at the time it was referred to by the Law Commission, or at any other time, you do not conceive it to exist now?—I do not conceive the dissatisfaction to exist now; and I do not conceive the cause to exist to the extent to which it did. I think it extremely likely, on the other hand, that the dissatisfaction that I alluded to in 1833 may still exist much longer than the causes which originally created it.

1316. And therefore, though it exists, you are of opinion that the grounds upon which it exists are now in a great measure, if not altogether, removed?—I should wish it to be distinctly understood that I do not think the dissatisfaction which has existed of late years is to such an extent as to be the subject of remark or observation; on the other hand, I beg to observe, that I by no means wish it to be supposed that I do not frequently and constantly hear dissatisfaction expressed by a losing party, and by the losing party's solicitor and agent; I hear that continually and constantly, and I think it very often groundless. In the heat of debate, in my own mind, I have felt sometimes, from a consciousness of having omitted things that I had to say, that I wished I had made a longer speech upon the subject; but I have very often, when I left the court and walked home, been quite satisfied that the court were right in thinking that I was not making any impression, that I was speaking uselessly long upon a point which was quite clear, and that I could not make out of a bad cause a good one.

1317. Has the time occupied by the court in its sittings much increased since 1825, as compared with former periods?—I should say that varies according to the nature of the cases.

1318. But generally?—I am sure I cannot tell.

1319. Has the time occupied by the sittings of the court, in your opinion, increased of late years?—I should say decidedly increased since 1833, so far as I know the two divisions.

1320. You think there is a marked change in that respect as to the time occupied in court?—I answer that in this way: I think there is a marked change as to the extent to which the cases are heard in court; I think the change has also produced this, that fewer cases sometimes are put out for a particular day, and then it frequently happens that the cases that are put out may turn out much shorter than the court expected; at present it is the understanding of the court that the reclaimer opens his case in any way he chooses, and until the court see that, in point of fact, the counsel for the reclaimer has nothing to say that at all shakes the judgment of the Lord Ordinary, I am not aware of any interruption he receives, and therefore of course the cause is heard to the extent that the counsel and his party wish.

1321. In your opinion, of late years, has the time of the judges spent in court increased?—I should say of late years it has, according to my experience.

1322. You have mentioned that a greater number of cases are now heard not upon written argument?—Yes; the proportion of written argument is very small.

1323. Have you any idea of the average number of hours the courts sit?—No; I fairly own that I never thought of timing the court.

1324. You are of opinion that no legislative remedy could be applied to that?—None whatever; it is right that the Committee should understand, that since 1834 we have had in both divisions judges who were formerly outer-house judges who had the experience and practice of hearing cases at the length that many suitors and many agents think the only way in which they should be heard in the outer house, upon the system that I adverted to in my evidence in 1833; there is Lord Mackenzie and Lord Corehouse, and latterly Lord Fullerton in the first division, who were outer-house judges, and who cannot be supposed therefore to wish to act upon a different principle, and do not, when they get into the inner house; there is Lord Medwin in the second division, and there will also be another judge soon, I hope, in that division, who has been long in the practice of the outer house.

1325. Is it your opinion that the judicial business of Scotland, so far as it is done by the inner houses is sufficiently done in public, or that it is left to the judges to do too much of it in private?—There is not the least doubt that the public, the litigants in particular, never will properly estimate, and very often do not do justice to labour which they do not see the performance of; and there is no doubt whatever that the very system that Dr. Lushington seems particularly to approve of will always be attended with that disadvantage, that the knowledge acquired before



before the party's counsel states the case, is thought to be knowledge which the judge should not have, and the extent of time in acquiring which the party does not know—that is all true—on the other hand I think that if that extent of knowledge, or any degree of knowledge of that kind, is acquired by the judges beforehand, the same consumption of time in court, as if the judge had not the knowledge of the cause at all, is a useless and unnecessary consumption of judicial time; and I would wish to add also, that I think it is extremely inconvenient that judges should not have a certain degree of knowledge of the cause beforehand—such a degree of knowledge as very materially abridges the discussions in court;—especially where the arguments are addressed to more than one judge; because, if the cause is entirely new to three or four judges sitting together, you are never aware of the extent to which your statement may convey the same impression of the facts to a number of judges, which you can easily ascertain when you are addressing yourself to one; and therefore that is one of the reasons why I think I was wrong in thinking, in 1833, that it would be a better plan, that the court should have hardly any knowledge of the cause before they came into court. I dare say it may answer much better when you are addressing yourself to one judge, than when you are addressing yourself to four.

1326. You observe that Dr. Lushington said, that whatever study was bestowed by the judge at home, made no difference, in the practice of the Privy Council, in the length of the argument of the counsel?—Then I fairly own I think the practice of the court in which that prevails is a practice I cannot approve of. I think there is a very useless consumption of judicial time, because I do not see why the same laborious, full and anxious statement of the facts should be made by the counsel, if on the other hand the judge is to acquire a very accurate knowledge of the facts beforehand; I think one great recommendation of the study of the papers beforehand is, that it saves unnecessary and useless statements by counsel; and I fairly own that I think that result is a very great and important matter for the due administration of justice, not merely as saving judicial time, because the time of the judges is not the object, but as tending to improve the system of pleading by counsel.

1327. Do you think that where there is no written argument, the suitors, or the profession, or the public, can ever have any satisfactory security that all the arguments which a party is entitled to address to a judge shall be well considered by that judge, unless those arguments are stated *viva voce*?—If they are not fully stated, of course the statement of the cause is imperfect.

1328. A judge bestows a great deal of labour at home in the preparation of the case, discovering by his own study where the cases lie, and turning to the authorities which bear upon it; now, if he decides that case with reference to his own study, and not with reference to full *viva voce* discussion in public, is it possible that the profession or the suitors can have an assurance that the arguments have their full weight upon his mind?—I should say not; but in the way in which the cases are heard in the Court of Session, I should not say that the judges study the cases with a view to make up their minds; because I see continually when cases are cited, many of them are new to the judges, and if they are not such as they can make up their opinions upon at once, they say “We had better delay making up our opinion till to-morrow or some future day;” I beg to be understood that causes are not so studied in the Scotch Courts. If the question is put in the abstract, I answer it in the abstract.

1329. Do you think that the *viva voce* argument and discussion in the Court of Session is such as in itself to give that full satisfaction to the public that the public and the suitors are entitled to have, that their arguments have been fully stated and considered?—I think the best mode of answering that question is this: I think it extremely likely that in the course of time the length of the *viva voce* pleadings will be increased; I think the very agitation of this question in this Committee will increase it; but at the same time I beg to add that I do not think that at present the extent of *viva voce* pleading is so curtailed as to afford any ground of complaint or observation whatever.

1330. Then you do not think that any increase which this Committee is likely to produce, or any other, would be an improvement in the mode of conducting the business of Scotland?—I cannot say that any improvement would be created by it; I think it as likely to lead to an unnecessary consumption of time as not.

1331. Do not you think, in a case going to appeal, it is a satisfaction which the parties and profession are entitled to, that the judge should explain fully and distinctly the ground upon which his opinion rests?—Certainly, with reference to

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the nature of the cause, and with reference to the facts that he has before him, very often we have a very articulate judgment of the Lord Ordinary pronouncing distinct propositions in point of law applicable to the particular case, and with a long note; but I do not think it is necessary for the judges in the inner house to set about delivering opinions at great length without reference to the impression that exists at the time as to the particular necessity for doing so in that individual case; and, I should say, of late years, the opinions of the Scotch judges are given at as much length as is at all necessary. I looked lately into a great number of English reports upon mercantile law, and I was surprised to find how short many of those opinions were.

1332. Then you think that in that respect there is no room for any change for the better, and that the opinions delivered by the judges are at this moment so complete as to be satisfactory to the parties?—I should say generally so; most undoubtedly I think the opinions are longer than they were in 1833; I think they are more aware of the necessity of pointing out their difference of opinion from the Lord Ordinary, where the grounds of his judgments are not those in which they entirely concur; but I also think the manner in which the cases are prepared in the outer house in many instances often supersedes the necessity of any great length in those opinions; I think there is a very great improvement in the conduct of the business in the outer house since 1833, from the lords ordinary getting more familiar with the working of the system of records.

1333. Are you not aware that there has always been the greatest satisfaction expressed at the manner in which cases have been heard before the lords ordinary since 1825?—Most certainly; it is accompanied at the same time with the disadvantage of the debate before the Lord Ordinary being only conducted at intervals; but as far as a very full, long and laborious statement before the Lord Ordinary is concerned, there always has been a great satisfaction with that, and such is very frequently necessary, in order to bring the cause to a point. After the case has occupied days in discussion before the Lord Ordinary, he comes to be satisfied that it will turn upon a very narrow point; and a case that has occupied six or seven or eight hours of discussion before him, may be most satisfactorily and fully argued and disposed of upon his judgment in the inner house in an hour, or even less, the case not being entirely new to the judges who have looked at the record.

1334. Do not you attribute that satisfaction very much to the fulness of discussion before the Lord Ordinary?—No doubt of it; but it does not follow that discussion in the inner house ought to be as full as before the Lord Ordinary; it certainly does not; in many instances, and wherever it is necessary, I think the cases receive it; there are many causes where cases are ordered by the inner house, after hearing counsel at full length, in order to take more time to consider it, and have the argument in that shape. I stated very distinctly to the Law Commission in 1833, that at that time I did not think that the cases were sufficiently and fully discussed in the inner house. I think the improvement has been very great in that respect since 1833.

1335. *Sir W. Rae.*] You mentioned that there is an inconvenience from counsel being carried from one division to the other, and from the lords ordinary; it has been discussed in this Committee whether there might be a division of the bar; what are your views upon that?—I think it perfectly impracticable, with reference to the nature of the business before the lords ordinary, and the business that takes place before the two divisions; if to any extent suitors suffered from it, they would of course take care to divide the business more among a greater number of counsel; it is one of those things that will always work out its own cure, more or less.

1336. *Sir C. Grey.*] Did I understand you to say that you thought it would be better if there were seven lords ordinary instead of five?—Upon the whole, I fairly own that I would rather see seven than five; but I do not think I would be inclined, even if I was in office, to recommend another change.

1337. But you think it would be better?—I think, decidedly, that the reduction has been carried so low, that the indisposition of a single lord ordinary may be productive of the greatest possible inconvenience, and also, that if the business was equalized, there would be still a risk of very great arrear.

1338. Independently of the objection to perpetual changes, seven lords ordinary would, in your opinion, be more convenient than five?—I would rather see seven for the despatch of business than five; the very reduction of the number added to some of the inconveniences spoken to by Mr. Serjeant Jackson, as to the principle of selection.

1339. If

1339. If there were seven lords ordinary, would not two be what you call ambulatory?—No, they would still be permanent lords ordinary, in the same way with the other five—four in the inner house, and seven in the outer house, as there used to be.

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1340. You consider that there would be an advantage in having, in each of the divisions of the inner house, one judge who was a lord ordinary as well as a judge of the inner house, because he would make them acquainted with the practice of the day?—Yes; and by having seven you could more easily accomplish that, because the objection to the plan I throw out is, that it would be such an obstruction to the business of the outer house, that I doubt whether it could be accomplished.

1341. If you had seven lords ordinary, there would be one of the judges of each of the divisions of the inner house in the situation that you think would be advantageous in the conduct of the business?—But I beg to say, that I should be sorry to see the number of judges in the outer house reduced to three, in order to effect the plan which I have suggested.

1342. You think it would have been more advantageous to have retained 15 and had seven of them lords ordinary?—Yes.

1343. How would that affect the plan of having one in each of these divisions of the inner house who was also Lord Ordinary?—My plan was not to have one of the lords ordinary in particular, but to have each of them sitting in rotation in the inner house, or on alternate days in the inner house, when certain causes from the lords ordinary are before them; but there are so many disadvantages attending that, that I am not prepared to state that that is a plan that I should desire to state or to see carried into execution.

1344. Do you mean that there should be the four permanent judges of each of the divisions of the inner house and the lords ordinary in addition?—The four permanent judges of the division, and five or seven lords ordinary, who would each in rotation be brought in.

1345. Making five judges instead of four in each division?—Yes, when they sit, but that necessarily implies the abstraction of each lord ordinary for a certain time from his duties in the outer house, and therefore I admit there are disadvantages as regards the outer house, which counterbalance the advantage of the plan.

1346. *Sir W. Rae.*] Might not it lead to the inconvenience of the case being decided by one vote, three judges being on one side and two on the other?—Yes, and that was one reason for reducing the number to four; I do not think that an adequate reason.

1347. If the Lord Ordinary was of opinion with the minority in the inner house, the number of judges would be equal, and a decision given on one side?—Yes; but at present sometimes one judge in the inner house concurs with the lords ordinary, and therefore you have the case decided by one; one judge in the inner house concurs with the Lord Ordinary, and two of the inner-house judges differ, and then the fifth decides.

1348. *The Lord Advocate.*] In the inner house you might have perfect equality if the sat five, by two concurring with the ordinary?—Yes, but that is a case in which they would probably consult the other judges.

1349. *Sir W. Rae.*] The remedy at present for equality is by consulting the judges?—Whenever there is a difference, they are bound to consult the judges of the other division, or the whole court.

1350. The Committee have had some evidence given as to reducing the time of the Lord Ordinary by having motions made by agents; what is your opinion upon that?—I think it most decidedly objectionable; motions as matters of course pass as matters of course. In the Scotch courts it very often happens that for those motions of course the counsel in the cause do not receive fees; it is expected that those motions should be made; it is not a matter of etiquette that there should be always a fee given in those cases, and they occupy no time at all. On the other hand, the counsel always insist upon knowing enough of the nature of the case to see that it is something that he is entitled, in the absence of the other party, to ask for. Without meaning to throw any imputation upon the agents, yet considering how much they are necessarily mixed up with the cause, I consider you would run a very great risk in some instances of advantage being taken, in the absence of the other party, if counsel did not make those motions, and that would lead to the necessity of greater attention by the opposite party to those motions which now pass as a matter of course, and in that way it would certainly

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lead to more discussion and more expense ultimately, and more consumption of time.

1351. *Dr. Lushington.*] Do those motions of mere form ever take up so much as an hour a day of the Lord Ordinary?—Certainly not the unopposed motions; the opposed motions often are of great importance, and take up a great deal of time.

1352. *Sir W. Rae.*] They are mixed together?—Yes, they occur in the same roll; the Lord Ordinary does not know, if he has 60 or 70 motions (which he has very often), how many are to be opposed and how many to be unopposed; a long roll of motions may be got rid of in half an hour.

1353. There is no rule of particular counsel only being allowed to make motions?—No.

1354. *Mr. Serjeant Jackson.*] Is there a certain portion of those motions in the roll to be called on before the court which are wholly matters of course?—There will be a proportion, more or less, but it will vary every day.

1355. Why should those motions be brought on before the judge; why should they not be disposed of in the office?—I think that there are a great many disadvantages connected with such a practice; in the first place, that which is a matter of course at one stage of the cause may not be so at another; when a motion is to be made, you never can tell whether it is to be opposed or not to be opposed; you are bound to give intimation of it regularly to the other party, and it might often be productive of considerable delay if you could not enter it before the judge till after you knew whether it was to be opposed or not to be opposed.

1356. Then there is not in Scotland any thing which is properly, as we understand it, a matter of course, such as side-bar rules; in England and Ireland we have certain matters which are mere matters of course, and those are obtained by going into the office; such matters, for instance, as calling upon the parties to proceed?—It is very difficult to explain one system by reference to another; we have motions that happen in a particular case to turn out matters of course, and if an appearance has not been entered at the first stage of the cause, then the taking of the decree may come to be a matter of course, if the party does not then appear, and under certain penalties is allowed to enter an appearance; I do not recollect any thing at this present moment that is equivalent to a motion calling upon a party to proceed, except a motion in the jury causes, which is rather the dismissal of the cause, if the party has not proceeded for a certain time after the issues are drawn up; but then if he shows a reasonable cause for that, the other party does not get the action dismissed.

1357. In our common law courts in England and in Ireland we have a declaration filed by the plaintiff; the defendant puts in a plea to that; the plaintiff puts in a replication, and so the cause goes on; now it is a matter of course to put a rule upon the file, calling upon the defendant to put in his plea, and again upon the plaintiff to reply after so many days; you go into the office and get that rule, and serve it upon the party; have you any thing analogous to that?—Our rule is this; the defences must be lodged in the cause within a certain period of time; that requires no order at all; if those defences are not lodged, it is an undefended cause; the decree will then be obtained upon a motion; if the party does not apply in a certain time to be reponed against his neglect, under payment of certain costs; but you cannot be sure that he may not make that application; and it would be productive of additional delay, therefore, to allow the motion in such a case to be made before a clerk, and very often the petition might then be put in to be reponed for the mere purpose of causing additional delay; it stands better as it is at present.

1358. Then there is no class of motion business of which it can be said, *a priori*, that it may not be opposed by the opposite party?—Very few cases. We have had a great deal of discussion at the bar, as to whether or not we could abridge the number of motions (which we should be very glad to see done, for nobody benefits by them at all), by doing anything before the clerks; and I believe the general opinion of all intelligent persons is, that it would be a most hazardous and inexpedient thing. A committee of the judges have been considering the draft of an act of sederunt, with reference to the conduct of jury business: the court said, before they sanctioned it they would wish to have the opinions of the bar upon it; and those most conversant with the jury business sat upon the draft; every thing that they objected to the judges gave up, and delayed every thing that was doubtful; and in that discussion we had a great deal of consideration

ation whether or not we could make motions in recovery of writings, and so on, before the clerk; and we all became satisfied that it would lead to greater delay and expense.

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1359. It is your opinion that you cannot take out of this hand roll any class of business with safety to the administration of justice?—Most decidedly; it may turn out very often that an individual motion might be made before the clerk; that is perfectly true.

1360. But, *à priori*, you cannot say whether it will or will not be so?—No.

1361. Sir C. Grey.] Is it not an objection to the party who institutes a suit, having the right of choosing the Lord Ordinary, that where the case involves a point of law or practice, upon which the judges are divided in opinion, he may choose that judge whose opinion he knows to be in his favour?—To a certain extent you may say that is a disadvantage; but, on the other hand, considering that the Lord Ordinary is not the whole court, and that it is merely the first decision in every cause, that consideration makes the difficulty of less importance than, for instance, in some of those controverted questions upon which the present Vice-Chancellor and the present Lord Chancellor are understood to have a difference of opinion, and you were to get the judgment of one of their courts in the first instance. I do not think it of any moment.

1362. Would not the responsibility of the Government, in appointing judges, be just as great if the business were distributed in rotation among all the lords ordinary, as if a party had a right to choose the lord ordinary, because, if the Government appointed an improper judge, he would have important cases devolved upon him more necessarily than he does now?—I used an improper term when I said the responsibility is increased, because of course, in reality, the responsibility is the same. I ought to have said, that it was a great practical check, because I do not think, in regard to that important department of the executive government, the mere fact of that responsibility is sufficient without those practical checks which in different systems are devised, with a view to see that the duty of right appointment is performed under an adequate sense of responsibility. The responsibility is the same in all instances to select the best judge; but I should say, that it is a great practical check when the Government know that if they select a man not of adequate talent and experience, the result in all probability will be exhibited very soon in the public dissatisfaction by this selection of ordinaries:—not that I wish it to be understood, in the smallest degree, that the difference of business necessarily implies, or is considered to imply, dissatisfaction with the judge. There is very often the greatest possible caprice; there is often a run upon particular lords ordinary. Sometimes the ordinary with the longest roll may be chosen if the object of the party is delay, because it frequently happens, when cases are brought up from the sheriffs' court, the party who has lost in the first instance does not want a speedy judgment of his case, and therefore he is glad to take it before a lord ordinary, by whom he knows it will not be decided for a great length of time: and therefore if the state of the business was in all instances viewed by the country, and known by the country, to be the true test of the manner in which the judicial business was done, and a fair test of the judicial character, no doubt the mere state of the business would imply a reflection which that state of things does not necessarily imply; for instance, a judge may not have been in practice at the bar for a considerable length of time past, and it will be some time before the public gets confidence that his knowledge of forms is such as to enable him to despatch the business with rapidity, and that he had not forgotten any of his law from having been occupied in duties of a different nature; at the same time, as the difference will always be understood by the country when that disproportion arises from a distrust of the judge, it does operate as a great practical check.

1363. Sir W. Rae.] What is your view with respect to lengthening the session; do you think that could be advantageously done, so as to diminish that arrear before the lords ordinary?—I fairly own that I do not think that the session, either with reference to the inner house or the outer house, ought to be lengthened. I think that it is absolutely necessary that there should be a certain degree of repose, both for the profession and the judges, from the discharge of judicial labour; I think it is of great importance to the country that the time of the bar should not be wholly and exclusively devoted to study of law; I think we have benefited greatly in Scotland by being able to devote a certain portion of time to those pursuits and those studies which, by tending to enlarge the character of the minds of those engaged in the profession, are of great value to the country: they

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tend to keep up habits of independence and habits of public spirit on the part of the bar; and, on the other hand, I think it is of equal importance to the judicial character that you should not, by over working the judges, make them, as was once said of one English judge, "legal monks."

1364. Have there been any changes in the length of the session?—There has been a change in the duration of the vacation, and there has also been a change in the length of the session, so far as the lords ordinary are concerned, and there is a power to the Queen in Council to add to the length of the session in the inner house, not exceeding a month, whenever it shall appear to the executive government that that is necessary.

1365. The length of the session in the inner house has not yet been increased?—It has not.

1366. Do you think that it requires to be increased?—No, I do not; and I presume the power would be exercised, if there was any reason for exercising it.

1367. There is no such arrear of causes in the inner house as to render it necessary that the sessions should be lengthened?—No.

1368. Mr. Wallace.] Is there any arrear of business in the inner houses?—I suppose it will be found that there is a great number of causes in the inner division not disposed of; how far those causes may be causes delayed in consequence of written arguments being ordered, or the judgment postponed, or how far causes have not been brought on before the inner house, I cannot tell; there are a great number of causes that have left the lords ordinary, in which I am counsel, but why they have not yet come forward, I cannot tell.

1369. It has been given in evidence before this Committee that there is no arrear before one of the inner houses, and very little before the other; what is your opinion upon that?—There are a great many causes that have been decided before the outer house, that have not come forward in the inner house; they may be acquiesced in, or they may be cases brought in to the inner house very recently, I cannot state; with regard to any thing of the mere statistics of the court, I do not wish to refer to any thing that is stated in the returns, for I have no knowledge of returns; I cannot say that I am now more informed on that subject than I was at any other period; I could name a great number of important causes that have been moved in one or other of the divisions, that stand over for the next session, but to what extent those constitute what may be called arrears I cannot tell, but I could mention several that stand over for argument before the whole court.

1370. Sir W. Rae.] The Committee have had a good deal of evidence about what are called cases, or written pleadings, ordered by the lords ordinary, or by the inner house; has the practice of ordering those diminished or increased?—I think the practice of ordering them has greatly diminished, and I fairly own that I would rather have more printed arguments than at present prevail in the court.

1371. In the outer house, has the practice increased?—I should think, according to my experience, the practice of the lords ordinary ordering cases has diminished of late years very considerably; at the same time, one of the judges seems to attach more importance than others to printed cases; I should suppose the Committee would find, if there are any returns upon the subject, that there are more cases ordered by Lord Jeffrey than the other lords ordinary, but I should say, that the number of cases ordered by the outer house has greatly diminished, and I regret it.

1372. The Lord Advocate.] Why would you have more printed arguments?—Because I think there are a great number of causes in which that mode of stating the argument after *viva voce* discussion, bringing the parties to a point, and giving that additional opportunity of reviewing the cause upon authorities, is a very valuable mode of assisting the judge in considering and disposing of the case. I think that the sort of obligation supposed to rest upon them to introduce the change of more *viva voce* argument has led them to diminish prejudicially the number of printed arguments; I stated that to the Law Commission in 1833, and I retain that opinion still, of course more strongly, since the number has been diminished.

1373. Mr. Wallace.] Is it not quite discretionary with the lords ordinary to order cases or not?—Perfectly discretionary.

1374. As regards the inner houses, has the practice to order cases increased or diminished?—It is difficult to answer that question; it has not increased, but that will always vary with the nature of the causes; there may be some years in which the lords ordinary have ordered more cases, and then the inner house have  
not



not ordered them; or there may be more cases come into the inner house without written arguments, in which, upon the discussion of the cause, the judges have a difficulty, and in which the lords ordinary had no difficulty; and then the inner house orders cases, and a frequent practice is for the counsel to beg the court to order cases. The Lord Advocate and myself are often in the habit of stating in important causes, after full argument, that we wish the court to order cases, and commonly the request of counsel is acceded to immediately. In other cases, after the argument, the court say, "We should like to see this stated in printed argument;" and I certainly think that it is of great importance to have cases ordered; if the cause is to be appealed, it is of immense value to have the argument stated in that way when the cause goes before the Court of Session; I think it is also more likely to diminish the number of causes that are appealed, because undoubtedly the Scotch litigants do prefer in important cases having those printed arguments. According to my experience, I should say there are a number of causes disposed of, where no party can say that the discussion was not most full in court by the four counsel, and yet in which the agents of both parties, and very often the counsel, have felt a wish to have printed cases.

1375. Mr. Serjeant *Jackson*.] Before the late changes made in those matters of practice as to the printed cases, was it the course in Scotland to have printed cases in all causes?—Yes, and the desire that I have referred to on the part of the litigants I dare say was the result of that having been the invariable course of deliberation upon causes in every case whatever. But at the same time, notwithstanding the period which has elapsed since the change, I think we are all of opinion, generally speaking, that it is a most valuable mode of having important and difficult causes deliberately discussed and decided; and the best proof of it is this, that whenever it is not, and the case is appealed, though it is the intention of the parties to have Scotch counsel present, there is always a full and argumentative case put into the House of Lords.

1376. Sir *W. Rae*.] You said that you disapproved of the notes of the Lord Ordinary; do you consider the effect of those notes to be to stop proceedings in the inner house, that is, to make the Lord Ordinary's judgment final?—I beg leave to observe that I did not disapprove of the note; what I stated was, that I think the length of the notes, particularly of late years, adds considerably to the dissatisfaction of the reclainer when he has to state his case, and to the embarrassments, when the judge considers the cause beforehand upon the printed record with those notes accompanying it; because it would be a very useless consumption of time, if he is to look at the cases, and you are afterwards to read over in court the printed note, which the judge can much better refer to and study at home.

1377. The judge, in making the note, cannot tell whether the judgment is to be acquiesced in or appealed from?—No.

1378. He cannot make a distinction, therefore, on that account?—No.

1379. Will not the note be such as will lead, in his opinion, to the judgment being acquiesced in?—I am most fully convinced that those notes, so far from leading the parties to acquiesce, lead rather to more reclaiming notes, and that the judgment would have greater weight without these notes. It is very difficult for a judge to write out a long and anxious argument of five or six pages, even with the utmost labour (and nothing can equal the industry and laboriousness with which those notes are penned), without falling into what the party conceives to be a misapprehension of fact, or some error in point of law, which the party exaggerates in his own mind, and imagines the case turns upon it, and often reclaims when I advise him to acquiesce; and then he has the satisfaction to hear that the court think the cause perfectly clear, and the point in the note that had led him to reclaim, unimportant; that they differ from the Lord Ordinary in that particular point; that they do not go upon that, but they confirm his judgment.

1380. Do the inner houses ever deal with those notes without paying much respect to them?—They very often state a difference of opinion, and go upon a ground different from that which the Lord Ordinary has expressed, or rather some of the grounds, for the object of the Lord Ordinary in making those notes is to state his whole views, those to which he attaches importance, and those to which the party attaches importance, and it may happen that the court differ in the view he takes of the different grounds that are mentioned; I think that those notes have tended a great deal, looking to the extent to which the judges read the cases beforehand, to their coming into court, in many instances, with an impression upon the case; they derive that impression in a great degree from the note of the Lord Ordinary; I beg it however to be understood, that I am very far



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from not appreciating the labour and study with which those notes are prepared; and I do not think that that is a matter that can be a subject of regulation; you cannot prescribe to the judge how he is to deliver his opinion, or write out his opinion, if it is to be written at home; but when the question was put as to the effect of the system in its practical operation, and the consequences of the judges looking into the causes before they came into court, I stated that the impression complained of is more derived from the anxious notes of the Lord Ordinary than from the judges looking into the pleas and the record.

1381. Is part of the vacation occupied with trying jury causes in civil cases?—There are sittings of the court after the close of the session in Edinburgh, and then there are the trials, if there are any to take place, upon the circuits; a very small proportion take place on the circuits; in civil cases there may be a fortnight or more after the session occupied with trials in Edinburgh, and sometimes trials before the court meets again in Edinburgh.

1382. We have had a great deal of evidence of trial by jury not succeeding in Scotland, and the causes of it; have you any thing to state to the Committee upon that subject?—I fairly own that the only matter regarding the whole administration of justice in Scotland that has weighed upon my mind of late years, is the question respecting trial by jury. I have always regarded it as the most important and beneficial change that could be introduced into the jurisprudence of any country. I am a great advocate for it, not merely as being an excellent mode of disposing of causes, but also because the disposal of causes with a jury has a most beneficial effect on the genius of the law and on the judicial character, which I value very highly. It was a change which it was anticipated would not be very popular in Scotland, and it certainly has turned out (I will not venture to say from what causes) that it is not popular. Unquestionably the original Acts of Parliament were so framed as to increase the dissatisfaction; there was a certain degree of jealousy entertained of the Court of Session; it was thought that they would swamp, as it was said, a trial by jury; and then it was thought that they might send too many cases to be tried by jury. At first the cases were to be looked into with great scrupulosity, to see whether they were cases fit for a jury or not; and very special issues framed of individual matters of fact which tended to impede the progress of the trial, gave great dissatisfaction, produced contradictory verdicts, apparently upon issues in the same cause; this arose from separate points being put to the jury, instead of proper issues, that embraced whatever was issuable matter in the case. Then the next Act of Parliament went upon the opposite extreme, and compelled a great number of cases to be tried by jury, whether the parties wished it or not, and that certainly has produced a great deal of dissatisfaction. There are a great number of other causes for the dissatisfaction. I would say, that the people of Scotland have a distrust of each other in regard to jury trial. I meet with it continually, from litigants, from agents, and very often from other counsel; they wish that the case should be decided by the judges upon the facts rather than by a jury. I do not participate in that distrust in any degree; my feelings are perfectly different upon the whole branch of jury trial; but that prejudice does exist to a very great degree. Then it must be kept in view, that the whole system was new to us; we are not, I dare say, very skilful in it yet, and any error or any miscarriage in a jury trial is attended with a great deal more inconvenience than would attend error or miscarriage in the decision of the Lord Ordinary. There is much greater difficulty in setting the matter right, and much greater expense. There is another circumstance; formerly litigations lasted long, the depositions being taken in writing, were carried on, as it suited the convenience of the party to advance the money, the agent advancing a little at one time and the party at another; whereas now they must be prepared to meet the expense all at once.

1383. *Mr. Wallace.*] You stated that causes had been heard in a different form this year, at the suggestion of yourself and other counsel, from what they used to be; will you state what division of the court heard those causes?—I mentioned that, in several cases of late years, we asked the court not to read the cases before they heard the counsel upon them.

1384. In what division was it that this was done, or has it been done in both?—At this moment I recollect three cases; two in the second division, and one in the first; there are more cases, I know, but I remember those three in particular.

1385. *Sir W. Rae.*] And they all proved failures?—Two unquestionably led to a most useless consumption of time, and satisfied me that it would have been much better if the judges had looked to a considerable extent into the papers in the cause.

1386. *Mr.*

1386. Mr. Serjeant *Jackson*.] What was the motive in making the request to the court not to read the papers; was it to try the experiment?—In one of them, —I beg the Committee not to ask which—I fairly own that I did it in a great degree, because I thought that if the court looked into the case, I had not much to say; in the other two, we did it on this account, that we thought that the length of statement must be such that no previous investigation of the case would probably, in the least degree, diminish it; the result was as you will see in the reported opinions of one or two of the judges in one of the cases, that they were very much misled, as they thought, by the opening, and they found that the case was one of infinitely less difficulty than they had supposed, from a three days' speech of mine, in the first instance.

1387. Dr. *Lushington*.] Have you any objection to mention the name of that case?—No, none whatever.

1388. What was it?—*Gifford v. Gifford*.

1389. Mr. Serjeant *Jackson*.] The judges are able to detect the vulnerable part of the case by having read the papers?—Yes.

1390. That is a great disadvantage to the suitor on the wrong side?—Yes, and a very great advantage on the other hand, in every respect, to counsel, who do not wish to make a long, useless statement in the case, with which we know the judge is in a great degree acquainted. And it enables us to bring him at once to the points in the case.

1391. The *Lord Advocate*.] Cases, however, do occur in which you wish to make those statements?—Yes; because I knew that the length of the statement which must necessarily be made could not be diminished by any reading of the cases.

1392. Mr. Serjeant *Jackson*.] Suitors, you consider, are anxious to hear their counsel speak at great length upon their case?—Yes.

1393. And are dissatisfied with anything that would tend to curtail the statement of counsel?—No doubt of that.

1394. And that may go to account for the dissatisfaction existing in the minds of the people of Scotland?—Yes; and from the character of my countrymen I may observe, that that will operate more in Scotland than in other countries.

1395. You seem to have a great affection in Scotland for any thing that has been ancient usage, as I collect from part of your evidence?—Yes, that is shown in regard to jury trial.

1396. Mr. *Wallace*.] With regard to jury trial, you have stated that the cases are generally tried after the general business of the court is over; is there any good reason or any reason assigned why jury trial is not taken in the course of the session as a matter of routine?—I think the desire of the agents and of the profession determine when they will be taken; causes might be tried every Monday if the parties wished it; if the parties apply and had a case enrolled, it would be tried. Juries complain of being brought on Monday from a distance, because it is more inconvenient travelling on Sunday if they are not within a certain distance; but if there was the smallest wish by parties to have cases tried in the course of the session, I should say it would be done; the Chief Commissioner, when there was a separate jury court, used to try them on that day, and it was found that it was a very inconvenient thing in the middle of the business of the session.

1397. But is the Committee to understand that the reason why they are not tried in the session is to accommodate parties and agents?—Yes, and counsel; some of the judges would be trying causes every Monday if there was the least desire for it, or if the number of causes enrolled for trial required it.

1398. There has been a good deal of evidence showing how causes are obstructed before both divisions of the inner house and the outer house, by counsel not being able to attend when required; are you of opinion with those witnesses who have stated that obstructions of this kind very often arise from the cause I have stated?—There is not the least doubt that very often junior counsel ask the court to delay the hearing a case when the senior counsel is not present; very often the court, at their own motion, wish to hear the senior, if not present;—I should not say that that is a greater inconvenience in the Scotch courts than in any other, and it will cure itself if the parties think so; they will divide the business more among the counsel, if that is found to be an inconvenience.

1399. Is it chiefly the absence of senior counsel or junior counsel that creates this obstruction?—The absence of senior counsel.

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1400. How many senior counsel are there just now at the Scotch bar?—I would rather avoid stating that; I was asked the question in 1834, and I gave off-hand the number that I supposed, and I found that it gave some offence; I stated that I might estimate the number of five, exclusive of myself; it was thought that I should have included some other gentlemen, and therefore it is a question that I think I ought not to be called upon to answer; I would much rather not answer the question.

1401. Are there more leading counsel now than there were when you gave your evidence before the Judges Salary Committee in the year 1834?—I would much rather not answer the question; I should imagine the reason for my not wishing to answer it must be very apparent; if it is of the least importance, I presume a junior counsel would not have much difficulty in answering it. In my situation as Dean of Faculty, I think there is peculiar reason why I should not; there was greater reason why I should answer the question in 1834, undoubtedly.

1402. It has been suggested by several witnesses before this Committee that were counsel to be divided so as to form separate bars in the different courts, the obstruction to business would be diminished, if not taken away; do you see any way in which counsel could be divided, so as to effect the object of continuing the business of the courts without interruption?—I think the delay from that cause is not such as would at all require the division or separation of the bar; I think that it would be attended with a great many disadvantages which any body who understands the profession will at once perceive, especially where there are not two separate and distinct courts. It would be very unjust, though that is a minor consideration, because I do not think there is business enough in one court to warrant a separation; I think this is one of those things which will not go beyond a certain length, if it is a real evil, without working its own cure.

1403. You state that there are not separate courts; the evidence given before this Committee is that there are seven separate courts, including the office of the jury clerks, where the same counsel are called upon to appear?—Six bars; there are only four lords ordinary sitting on the same days.

1404. And the issue clerks?—Yes.

1405. They require counsel to appear before them?—Yes, and perhaps there may be two or three counsel in all the cases. It is more easy to accommodate the matter before the lords ordinary; it is only before the two divisions that it leads to delay; the Lord Ordinary goes on with another cause; it only breaks off the debate.

1406. Does not the delay in the outer house from absence of counsel frequently postpone causes to a great extent?—It leads to debate going on at considerable intervals, and that is a considerable inconvenience; on the other hand, if it was thought to counterbalance the importance of having individual counsel in a case, the suitor could retain counsel whose attendance he was more sure to command.

1407. Have the counsel of the Scotch bar been ever separated?—Never.

1408. There is not understood to be a division of what is called senior and junior?—It is no division at all; we have no silk gowns at the Scotch bar, except the Lord Advocate and the Solicitor-general; the Dean's precedence is a separate thing altogether; and neither do we act upon the rule strictly of seniority; it is not reckoned against etiquette for a counsel junior to the senior counsel in the cause to reply or even to take the lead in the case, if the senior says "it is a cause which I would rather you took charge of." There was once a proposition made to me, since I was Dean, by Lord Brougham, when Lord Chancellor, for the introduction of precedence, which I satisfied him would be very detrimental to the interests of the bar.

1409. Was it proposed to separate the bar?—No, there was never a proposal made to separate the bar.

1410. What was that proposal?—Mere precedence, giving silk gowns.

1411. Do the inner houses meet at 11?—They do.

1412. It appears by returns to the House of Commons that they sit upon an average about two hours a day; if those courts were to sit a considerably longer time during the day, and the sessions were to be increased, could not a great deal more business be done in the course of the year?—There is not the least doubt that more business could be done; but you will observe, that, in so far as the judge is occupied at home, very often the work that is conducted in the court will require the whole time of the judges at home; and it may therefore happen, and does

does happen frequently, that the two hours require full and complete employment of the time of the judges at home; you would have to lengthen the session greatly in order to accomplish the object, and a great deal of the vacation is occupied in reading the papers on which the divisions are to give their opinions.

1413. It appears by evidence before this Committee and by returns made to the House of Commons, that the quantity of printed papers now referred to the judges is much smaller than formerly?—Yes, from the great diminution of printed argument.

1414. Is it not a necessary consequence that they are not required to devote so much of their time to reading as formerly?—That is a natural question to put, looking at those returns only; I should say that, in the great proportion of cases, the study of the records in which you have to ascertain the facts with accuracy and precision, whether that is done before or after the hearing of counsel, is done with infinitely more labour than the reading of the loose petitions and answers upon which the judgments were formerly given.

1415. Am I to understand that the diminished quantity of printed papers brought under the consideration of the judges does not require so much time to read them, as formerly?—I should think it is extremely likely that it does not; at the same time, I fairly own, that I do not see how I can answer that question very well as counsel; it is impossible to tell, unless you have an individual judge who has gone through the business at the two respective periods.

1416. Does it not give fair reason to suppose, that since the papers are so very much diminished, and since the Judicature Act in its spirit requires so much more of parole proceedings than formerly, that the judges really do not require to study so much at home, either during sessions or in vacation?—I should unquestionably say, from my knowledge of the fact, that the study by the judges at home is in no degree diminished; I should say, that the labour of the lords ordinary, since the Judicature Act, has been increased to an extent beyond any thing that existed under the former system, both the extent of their labour and the responsibility of their duties, the responsibility of each individual step taken in the cause by them: and I would not say that the extent of attention to the causes has not, in the smallest degree, been in the inner house diminished, if you take the minutes or hours consumed in going over a certain number of printed pages at the one period and the other. I cannot in the least degree tell how that matter may stand; it is quite impossible. I am quite persuaded the answer which will best convey my own opinion upon the subject is this, that I am satisfied the nature of the duties imposed now upon the inner house, whose judgment is final, who have not now the opportunity of reconsidering their judgment, which they had previously, upon a second written argument, which the losing party might bring before them, renders the discharge of their duties much more onerous, and requires greater attention and greater vigilance in the most minute particulars than was necessary formerly.

1417. I understood you to say, that in your opinion there is no matter of form and routine duty performed by the judges of the inner house which could be dispensed with?—That question was not put to me; the question put to me related to the motions before the lords ordinary.

1418. Are there, in your opinion, certain routine duties and matters of form which are at present performed by the four judges of the inner houses, which might be safely deputed to inferior and other hands?—Certainly not, none whatever.

1419. Is the Committee to understand that, in your opinion, there can be no improvement made for facilitating the business of the inner houses?—No improvement which will not be the result of longer and further practice of the system which was introduced in 1825, and which of course will, in the progress of time, gradually become more and more valuable, as we get more accustomed to it.

1420. It has been stated to this Committee that at least an hour of the time of the judges of the inner houses, taking it on an average, is occupied daily with matters of routine which could safely be dispensed with; does that accord at all with your experience?—It not only does not accord with my own experience, but I should say that it is most contrary to the fact; in the second division the routine matters, the single bills, are often over in about 10 minutes; in the first division there are more incidental applications, and more of such business always naturally goes to the first division, where the head of the court is; with the first division it may occupy a quarter of an hour, very rarely that, but very often the matter is

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over so immediately, that one is summoned in for the regular business when you are hardly aware the bell has rung; I beg leave to say that I cannot state my answer to that question in any terms sufficiently strong to intimate my astonishment that such a statement should have been made to this Committee.

1421. In conveying to the Committee your opinion of the arrears before the lords ordinary, you have stated your belief of the power which is given to parties to choose their lord ordinary being a great advantage; and you also admit this choice has caused or is attended with a great deal of arrear, and that parties will find themselves in the predicament of having their cases postponed for a long time, in consequence of that arrear of business before those lords ordinary; have they it in their power, in such a case, to withdraw those cases and place them with others?—No, they have not.

1422. Then it is imperative, when they have once chosen a lord ordinary, to allow the case to remain there, whatever delay may occur?—No doubt, and it is attended with this additional disadvantage, that it is a choice that is given to one party; the defender has no choice about the matter; it would require a separate application, if competent, to remove a cause from one lord ordinary to another lord ordinary, and would not be attended to in individual cases.

1423. In practice, is it done?—I am not aware of it having ever been done in practice; I dare say, if 20 or 30 of the parties on each side of the case at the foot of Lord Jeffrey's roll were to make an application to the judges to say that they wish to have the cases transferred to another judge's roll, the judges on such an application would do it, if they have the power, but they would not listen to such an application in a single cause.

1424. Has the court the power to transfer causes from one lord ordinary to another?—I should have great doubt upon it, unless the consent of the Lord Ordinary was obtained; there is no Act of Parliament or act of sederunt which contemplates it. In the event of the indisposition of one lord ordinary, another is authorized to call his hand-roll for the purpose of the despatch of business. You cannot remit from one division to another. I ought to observe, that the parties, in the choice of their lords ordinary, always have the probability of that arrear in view, because the first year will show, probably, that there is a likelihood of arrear before the judge. In the very first year of Lord Conyngham's appointment, so large a number of causes were enrolled as showed that there would be an arrear, and yet parties continued to enrol their causes before him.

1425. Is the Committee to understand that parties choose the lords ordinary because of their supposed superiority as judges?—There is no doubt that that operates to a very considerable extent; on the other hand, just because more causes are enrolled before one lord ordinary, others do it without thinking any thing about it. There is nothing in which there is so much caprice and unreasonable prejudice operating upon the minds of parties; all those circumstances are drawbacks, and it is difficult for those who do not see the working of the system to understand why you should proceed upon a plan which acts so unjustly to the judge, by introducing a kind of popular principle into the judicial system, which ought not to prevail; nevertheless, I think, with all its drawbacks and disadvantages, it would be a pity to withdraw it from us; but I admit all the inconveniences which the questions recently put point out.

1426. Should you see any objection that the parties should have the power, by application to the court, of having the cause taken from one lord ordinary's roll and placed on the roll of another lord ordinary?—If the two parties consent when the case is at the foot of the roll to have it transferred to another, I do not see any objection; but at the same time it is right that the Committee should understand that frequently that change would not be for the benefit of the cause, because there may have been a number of interlocutory judgments pronounced by the Lord Ordinary, the full object of which the other Lord Ordinary would not have in view, and in the desire of having speedy justice the parties might find that they had taken the worst means for that.

1427. The *Lord Advocate*.] You would not extend that to cases partially heard?—No; that would be impossible.

1428. Mr. *Wallace*.] In other cases you see no objection?—I cannot suppose that it could be a subject of legislative enactment; an application might be made by the parties, and it might turn out that they would regret it.

1429. Is

1429. Is it your opinion that any improvement could be made so as to simplify and shorten the duties of lords ordinary in respect to making up the records?—Very great improvements may be made; and I hope I shall see them made in simplifying and improving the records, but such improvements will in no degree whatever lighten or diminish the duties of the lords ordinary; I do not see how the two things can well be connected.

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1430. Will you explain in what manner the one is to be effected without accomplishing the other?—Because the duty of the Lord Ordinary, in preparing the record, is not to frame the record; in the first instance, if there is an objection stated to the summons, he disposes of this objection; if, when the condescendence and answer are given in, there is impertinent matter, the party may object to that, and have it struck out. It is the length of this record, or rather the number of revisals, that is the great objection; that is carried on by the party; the record ultimately may not be longer when it comes before the Lord Ordinary, but there will be before it is completed repeated revisals by the parties. I do not see how the judicial labours of the lords ordinary, so far as they are concerned in the preparation of records, will be diminished by improvements in those records.

1431. It has been stated to this Committee that there is a considerable portion of the time of the lords ordinary each day occupied with matters of routine and form which could be conveniently dispensed with; does that accord with your opinion?—I have stated at some length that I think there are no motions and no matters before the lords ordinary that could safely be devolved upon the clerks, and I should think it most detrimental to the interests of the people of Scotland if it were done; I should protest against it as being most detrimental.

1432. Or any other matter now done by a lord ordinary?—Yes, in so far as that may involve the far greater question, whether it would be expedient to introduce into Scotland, as recommended by Lord Brougham for England, in his speech on law reform, an officer to superintend the preparation of records, rather than the lords ordinary; I should conceive that to be a most detrimental and pernicious change for Scotland.

1433. Dr. *Lushington*.] You recollect your evidence upon the subject of the preparation of records given in May 1824?—I cannot say that I remember that.

1434. Have the goodness to refer to it, and say whether you retain the opinion given in those answers 609, 610, 611?—[*After looking at it.*]—Most certainly.

1435. Will you read those questions and answers?—“If the Committee have rightly had the evidence laid before them, it goes to this, that the lords ordinary prepare the causes, and after judge themselves upon them?—Yes, which I consider a very great advantage; that is, they have the superintendence of the preparation; the parties having the power to object to any thing in the pleadings of the other party that is irrelevant and improper, and the lords ordinary have the power of striking out whatever is irrelevant and improper. You consider that to be more beneficial than to cause that duty to devolve upon agents and counsel?—I am afraid the question involves a great misapprehension of what is done; the counsel of course prepares and frames the pleadings; the judge reads it before it is finally settled; and if there is any thing in it that is irrelevant, and not pertinent to the issue, it is struck out; or if either of the parties object to what is in his adversary's paper, or to any alteration the judge proposes, he has the power to bring it before the Lord Ordinary; but it is not prepared by the judge in any other sense; he does not, of course, frame the pleading. He applies the finishing-hand to the framing of the case?—I am afraid that I cannot answer that exactly in the affirmative; he reads the pleadings, with a view to see whether they contain irrelevant, loose and improper statements, such he directs to be struck out, unless the party can show that he is mistaken; or if the party objects, he is heard upon the pleadings before they are finally settled; the result of which is, that the opportunities are less in the hands of the agent and counsel (if there should be any such intention) to mislead or to increase the length of papers, by irrelevant matter, than there could be in any other system, and less opportunity is afforded either for evasive pleading or chicanery in the management of causes; all motions in reference to the recovery of documents, all motions in regard to further time, are heard by the lords ordinary; and I consider their preparation of the causes one of the most valuable parts of the Scotch system; the causes are thus brought to almost a single point before lords ordinary, before they are finally disposed of: if parties are dissatisfied with their judgment on any point whatever, with a few exceptions, they can go to the chambers of the Court of Session; so far as it is possible



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possible for a stranger to form an opinion of the English system, I think it would be a great improvement to adopt such a practice, and I recollect in a celebrated speech on the administration of justice in England, Lord Brougham strikingly pointed out the benefit of such a system as we have in Scotland, and which he considered might be carried on by some officer in England; perhaps the onerous duties of the English judges would not allow them to do that, but I should be sorry to see that taken away from the Scotch judges and intrusted to any but the judges."

1436. Mr. Serjeant *Jackson*.] Is that superintendence of the preparation of records, such as you have described, done by the judge in court or done in chambers?—The judge reads the pleadings at home; any statements he wishes to direct the attention of counsel to, or any arguments or motions made upon the records, are made in court. There was some years ago some discussion among us, whether those sort of motions and those explanations between the judges and counsel should take place at chambers or in court; my own opinion, and I believe the general opinion of the profession was, that it was much better that all judicial business should be done in court. I retain that opinion very strongly. I dislike any business being done not in court, so far as judges and parties being brought into contact. I do not like the authority which the judge has at home sitting at his table. I like the check which the open court gives to the judge.

1437. Does that branch of business constitute a large proportion of what is done in court?—Not strictly; that part of it, a great deal of what is termed the preparation of the records, does, because that, in the sense in which it is used, includes what I go on, in the second branch of my last answer, in the part of a former evidence now referred to, to explain, namely, all motions for the recovery of documents, and relative to the particular shape which the case may take, whether it should be remitted to an accountant before or after the record is closed; and, in short, a great variety of motions of that kind; I would not say that at present very much time is occupied in the mere discussion as to the relevancy of parts of the record; on the contrary, I think that usually the parties are too little in the habit of objecting to the relevancy of parts of the record; it was found, on the other hand, difficult for the judge to decide that matter on his own authority, for he might strike out that which upon an imperfect statement might appear to be irrelevant; it is a duty which is performed to the extent to which the counsel or parties choose to call it into exercise by the judge, because he must hear every motion that is made upon the record, to whatever extent.

*Veneris, 3<sup>o</sup> die Aprilis, 1840.*

## MEMBERS PRESENT:

The Lord Advocate.  
Dr. Lushington.  
Mr. Wallace.  
Sir Charles Grey.  
Dr. Stock.

Mr. Serjeant Jackson.  
Sir William Rae.  
Mr. Ewart.  
Sir Robert Harry Inglis.

THE HON. FOX MAULE IN THE CHAIR.

*Duncan M'Neill, Esq., called in; and Examined.*

*Duncan M'Neill, Esq.*

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1438. *Chairman*.] YOU are an advocate at the Scottish bar?—I am.

1439. When were you called to the bar?—In 1816.

1440. You held the office of Solicitor-general?—I did, for a short time.

1441. Your attention of course has been turned to the Judicature Act, the Act of 1825?—Yes.

1442. In your opinion has the intention of that Act been as fully carried out as was anticipated, by the substitution of oral pleadings for written arguments?—Not so fully as my anticipation was, and, I would say, not so fully as the general anticipation was; I may, however, state that at the time it was passed, I did anticipate that some period would elapse before it would receive full effect.

1443. Has it been carried to a greater extent in the outer house than it has in the



the inner house?—The oral pleadings are greatly more full in the outer house than in the inner house.

1444. *The Lord Advocate.*] The pleadings in the outer house have given greater satisfaction, both to litigants and to the profession and the public, since 1825?—I am of that opinion; I have no doubt that they have.

1445. You have mentioned that the system was not carried out so far in the inner houses; to what do you attribute that?—I attribute that to various causes;—at the time the Act was passed, the pleadings that were laid before the judges of the inner house were argumentative pleadings; a party dissatisfied with the judgment of the lord ordinary, submitted that judgment to review, accompanied with a full argumentative pleading, called a petition, and if the inner house considered that petition deserving of answer, they directed it to be answered; the answer was also an argumentative pleading, and the case being in that way before the inner house upon full argument, the counsel were not in the practice of occupying a long time in oral argument; when the court came to pronounce their opinions some observations were generally made by the counsel, but the discussion was not full. That habit continued a good deal, both with the bench and the bar; the habit was not to indulge in oral discussion from the bar in the inner house so much as in the outer house, except when hearings were specially ordered. There is also a reason why there ought not to be so much discussion in the inner house as in the outer house, viz., that a good deal of the matter is cleared away by the discussion before the judge of the outer house; you often find that many of the points originally raised in the case are not insisted upon after the lord ordinary has pronounced his opinion upon them, or perhaps that the parties have abandoned them at the bar of the outer house without the lord ordinary pronouncing a judgment upon them; and the lord ordinary, when he pronounces his judgment, frequently accompanies it with a note of his views. The case is thus reduced to one or two points, when it comes to the inner house, and I would not expect the same length of pleading there as in the outer house. Those are reasons why causes have not been so fully discussed in the inner house. Another reason is, that in the outer house the records and documents referred to are not printed, they are in manuscript, and the lord ordinary, sitting in the outer house, has a greater number of causes before him in the day than are put out on the roll of the inner house. It is therefore not to be expected that he is to be so fully master of the statements in all those records and the documents. They are not so accessible to him in manuscript as appendices to documents, as if they were in print, and, in addressing him, it is the practice to enter more into a statement of the case from its origin, and proceeding upon the assumption that he has less knowledge of the case than the judges of the inner house who have the record and documents before them in print, and therefore more accessible—who have fewer causes, and therefore have more time to study the records and documents in each cause coming before them, and each of which causes is by that time more reduced to a point; those are the substantial reasons.

1446. You think there is still a considerable practice existing, from old habits, of the judges studying the cases at home, with a view to arrive at an opinion from that study without waiting to hear the argument of counsel?—I have no doubt there is a habit on the part of the judges of studying the cases; I do not object to their studying the papers; my own opinion is not against their studying the papers; but the habit certainly is gradually wearing off of their forming their opinions upon the records, without trusting so much to what they are to hear from the bar.

1447. At any rate, is there a strong impression at the bar that they form their opinions upon the cases?—Yes, there has been, but I think it is wearing off.

1448. *Chairman.*] Has it ever occurred to you to find that the judges in the inner house have been so long in the habit of studying written arguments, as to show an indisposition to hear counsel?—No, I think they are disposed to hear what counsel have to say in reference to the case; of course, if you are addressing a person who you know has a knowledge of the facts of the case and the pleas, you are naturally not disposed (at least I do not feel disposed) to go at so much length in detail into the matter; and also, if you are conscious that there are untenable parts of the case, you soon see, when you touch upon them, whether the judge has the same view of them with yourself (a very little tact will find that out), and, if so, you pass from that and go to the part you rely more upon.

1449. Has it ever occurred to you to find, that, on your appearing in a case in the inner house, the judges have come prepared with written judgments to the

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exclusion of any useful arguments you might suggest?—No, I cannot tax my memory with that.

1450. With reference to your practice before the court, is it your opinion that there is sufficient business before the inner house to require two divisions in that inner house to transact its business?—I think so; I do not think one division could do the business satisfactorily.

1451. Do you think that the number of judges in either of the divisions might be reduced, with any advantage to the public service?—Certainly not; I think a fewer number than four would not be a good number for a court of review; I do not think it would be satisfactory at all.

1452. With regard to the outer house, do you think there is sufficient business before the lords ordinary to require the full complement of five, as at present?—I think there is; I do not mean to say that the five lords ordinary might not be able to dispose of more causes; but if you had fewer lords ordinary, I think you would not have an efficient force for the disposal of the causes.

1453. The *Lord Advocate*.] You are aware that at present there is a considerable arrear before some of the lords ordinary?—Yes.

1454. That arrear arises from accidental circumstances. Suppose the business before the lords ordinary were equalized, is it still your opinion that the number of five would not be too great for the judicial business of the country, under any arrangement that might be made?—That is my opinion.

1455. You mentioned, that the course of hearing before the lords ordinary had given great satisfaction from the commencement; I suppose you can hardly say that about the inner houses?—I must say, that I have heard more discussion upon that subject within the last few weeks than I had ever heard before, and perhaps my attention has been more called to it; I had not heard dissatisfaction expressed for a considerable time before that; at the same time my opinion is, that the suitors would be more satisfied, particularly the losing parties, if there was more full discussion. I do not mean by that opinion to convey the idea that the cases are not decided on proper grounds; but suppose a party to be present hearing his own case discussed, and that it is decided against him, he is very apt to have an impression that some things that have not been urged upon the court might have produced a different result if they had been so urged, although the counsel might be of a different opinion.

1456. That feeling may be shared by the counsel too?—It may.

1457. Generally, is it your opinion, that with respect to the business done in the two divisions of the inner house, a sufficient portion of that business is done in open court, or do not you think that the system would be very much improved by a larger portion of the judicial time being spent in court than is now spent?—I think it would be more satisfactory to the suitors if there was more full argument before the inner house; and I speak particularly of parties losing, because parties gaining are of course generally satisfied with the result.

1458. But you are of opinion, that it is one important end of a court of justice to satisfy the losing party that his cause has been thoroughly heard, though he loses?—I think that too great caution cannot be taken in order as much as possible to prevent dissatisfaction with a court of justice, even by the losing party.

1459. The gaining party is satisfied with gaining his cause, but it is an important part of justice that the losing party should be satisfied that at all events every thing has been said for him that could be said, and that every thing said has been considered by the court?—I think so; at the same time I think that counsel may feel very often not disposed to urge things which parties think it would be advantageous to urge.

1460. Dr. *Lushington*.] It is the duty of a counsel to exercise that discretion, and control his client?—Yes.

1461. Sir *W. Rae*.] And the curtailment of the pleading may arise from the prudence of the counsel, in many cases?—Yes, from the prudence of counsel, and the habit of counsel and the court; we are not used to speak so fully in the inner house as in the outer house, because we consider that the judges are in a better state of preparation, and have better means of making themselves masters of the case; but I still think suitors in many cases would be better pleased if there was a more full discussion.

1462. Has the practice improved in that respect?—I think it has.

1463. The *Lord Advocate*.] You are aware of the number of hours the court sit; what would you say was the average?—I can only make a guess at that; they meet at 11; I should say from two to three hours; I allude to the inner houses;

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I merely guess at the thing; the sitting is unequal in length; it depends upon the length that the discussion takes. Sometimes they sit a good deal longer.

1464. But discussions are sometimes very short even in those cases where there is nothing but the record before the court, and no printed argument?—Sometimes they are, but when there is a full printed argument there is of course less occasion for oral pleading, and, in that way, a case of bulk, that gives a great deal of trouble to the judges to study, occupies sometimes a very little time in open court.

1465. Mr. Serjeant *Jackson*.] Your opinion is that there is no just ground of complaint upon the part of the community in Scotland as to the mode in which the judges discharge their duty?—My opinion is that the cases are well considered and well decided, generally; but I think that, speaking constitutionally, it is an object to make a court of justice as popular as possible, to do away with prejudices, even though somewhat unreasonable, if you can avoid them; you cannot be too anxious in making suitors, whether reasonable or unreasonable, satisfied, if possible.

1466. That is quite true; but it appears that in Scotland you are very much attached to the ancient habits and modes of proceeding; you do not like innovations?—No; unless we are satisfied that a benefit is to be obtained.

1467. And the judges in their own particular practice, and the community also, have been so adapting themselves to the new state of things as gradually to produce a growing satisfaction with the mode of discharging public business?—I think the objections that I have been pointing to are gradually wearing away; I think the system is improving.

1468. Dr. *Lushington*.] But that it would be expedient and more satisfactory if the oral argument were at greater length?—Yes.

1469. Mr. Serjeant *Jackson*.] Have you, in your experience, found that some of your own clients have been dissatisfied with your having exercised your discretion in curtailing the case?—We come very little in contact with our clients personally; I hear more of the clients through the agents than from themselves personally.

1470. Have you, as we have in Ireland, some agents who are sometimes so unreasonable, as not to be satisfied with counsel for not urging every thing that is put before them?—I cannot say exactly as to that. The agents in Scotland do not generally express their opinions in that way to counsel; but I have heard agents say that they thought a case might have been more fully stated than it had been.

1471. Have you heard the agent state that that was the opinion of clients occasionally?—I do not remember a particular case, but I have no doubt that I have heard the remark made by agents, that cases might have been more fully stated than they had been.

1472. The *Lord Advocate*.] Have you found that particular part of the profession not quite satisfied with the length to which oral discussion takes places in the inner house?—Yes, I have heard agents say that they did not see why the discussion should not be so full in the inner house as in the outer house; I myself see reasons why it should not, but that shows the feeling on the part of some agents.

1473. And to a certain extent that is well founded, because the discussion is not in your opinion full enough?—I think it is full enough to get at the justice of the case, but not to satisfy the parties.

1474. Mr. *Wallace*.] Are you aware of any general feeling of dissatisfaction on the part of the public with the mode in which business in the Court of Session is conducted?—No; I have heard it said lately, since this Committee was appointed, that there was general dissatisfaction, but I cannot say I am aware of that, further than exists in regard to courts and lawyers in general.

1475. You have been asked whether Scotchmen are not averse to what are called innovations; are not Scotchmen always happy to have improvements introduced into the country of every kind?—Yes, I think they are, what they consider improvements.

1476. They are not so devoted to old practices as to prefer that which is not so good to that which is better?—Certainly not to prefer that which they think not so good, to that which they think is better.

1477. Sir *W. Rae*.] Is there not a feeling that there have been too many changes of late in the Court of Session?—I think so;—my own opinion in reference to that, and from communication with the profession upon it, is, that changes to any considerable extent in the mode of administering justice, though they may

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produce greater good in the end if they are judicious, are more or less evils at the time, and calculated therefore to produce dissatisfaction at the time; they lead to litigation on points of form; new questions arise; a man comes into court to have a case decided upon the merits; he finds that he has first to try a point of form, and he is dissatisfied with that.

1478. Were those evils occasioned by the changes in 1825?—For a considerable time there were many points of form raised, which I think always are more or less unsatisfactory to the parties.

1479. And those are all adjusted?—I cannot say all, because ingenuity suggests new objections to counsel, but they are substantially settled, I should say.

1480. Would it not be an evil to open such a matter again, except upon most serious and important grounds?—Undoubtedly; I say all experimental changes to a considerable extent are, more or less, evils at the time.

1481. *Mr. Wallace.*] You were a considerable time sheriff for the county of Perth?—I was for 10 years.

1482. That is the largest county in Scotland?—I believe it is, in point of surface, one of the largest counties in Scotland, and nearly as much business is done in that as in any county; not so much as in Lanarkshire; the city of Glasgow produces a great deal of business; but Perth is one of the most extensive jurisdictions any sheriff possesses in Scotland.

1483. You have stated that you are aware of considerable arrears existing before some of the lords ordinary; could you state to the Committee to what cause or causes you attribute those arrears?—I think those lords ordinary are very industrious, and work very hard; there are a number of cases brought before them, more than they can well get through.

1484. *The Lord Advocate.*] It is owing to the extent of the business being such that they cannot overtake it?—Yes; the two lords ordinary before whom the greatest arrears are, I think are exceedingly industrious.

1485. *Mr. Wallace.*] Are you aware of the time of the lords ordinary being a good deal occupied in discussing on points of form, and other matters arising in the course of the preparation of causes, or discussion on the merits?—There are discussions on points of form frequently before the lords ordinary before a case is ready for judgment, upon the merits; for instance, discussions on preliminary defences, that is involving perhaps an objection to the relevancy of the summons; those are discussions as to the form of the summons, but I beg to ask what is meant in the question by discussions on points of form?

1486. *Dr. Lushington.*] Discussions upon the defences would not be matters of course?—No.

1487. *The Lord Advocate.*] The result might be to throw the action out of court?—Yes.

1488. And by doing that to establish the most important rights of the party?—Yes, but I should like to have a more definite understanding in my mind of what is meant by points of form.

1489. *Mr. Wallace.*] Has any mode occurred to you of relieving the lords ordinary of any part of the duties which they now perform in hearing and disposing of causes after the records are prepared and closed?—No, I think that the causes are heard in a proper manner before the lord ordinary; nothing remains after the record is closed but that he shall hear the cause and pronounce a judgment upon it; I do not know how he can be relieved of that.

1490–91. It has been stated to this Committee that it might be advisable to devolve the preparation of causes and other incidental discussions arising out of the preparation of causes on one lord ordinary, or on the different lords ordinary in gradation; would such a course tend to prevent the lords ordinary from having their debates interrupted, from the absence of counsel, or any other cause, and getting into the arrear which they are at present in?—That would be relieving the lord ordinary from some of the duty before the record is prepared; I presume part of the lord ordinary's time must be consumed in going over and considering the record before he approves of it; if you take away from the lord ordinary part of his duty, of course he will have more time to devote to the remainder of his duty; I think that the labour of examining the records must be gradually diminishing as counsel get more familiar with constructing them in a proper manner; when the Act of 1825 was passed, it contemplated, as I read it, a vigilant superintendence by the lord ordinary of the shape and form of the record, and for a considerable time I think that was very necessary; different views were entertained at the bar with reference to how the record should be formed; some counsel indulged

indulged in large quotations from documents, and others thought it better to state shortly their points; now we are getting more into uniformity and more into brevity; and as we acquire more skill in that department, there will be less for the lord ordinary to do, and less occasion for him to check the record at all; I think that duty will be gradually lightening itself.

1492. *Sir W. Rae.*] You do not think he ought to be relieved of that duty under any circumstances?—I think it must be a judge who does it, and I do not see that it could be better done than by being distributed among the lords ordinary.

1493. *The Lord Advocate.*] Do you think the withdrawing the superintendence of the judge might have the effect of the system returning to what it was formerly?—I think it might, but the labour of that duty is of course diminished as we improve in skill in preparing the records. Part of the question put to me was whether it could all be transferred to one judge. I do not see the practical advantage of that.

1494. *Mr. Serjeant Jackson.*] Is it the function of the judge in this part of the duty to relieve the record from prolixities and impertinences?—It is so; when a judge finds such things in a record, he generally orders the case to be called; he probably, in directing the case to be called, issues a note suggesting what his observations have been with reference to it, that such matters appear to be irrelevant, or that such an averment is not sufficiently answered by the opposite party; the counsel come up to the bar, and if they explain why they have so framed the record, and that is satisfactory to the judge, the record remains as it was; if not, he desires them to amend the record.

1495. In our courts in Ireland, and I believe in England, the course is for the counsel, on the one side or the other, to object to certain matters in the proceeding that he conceives to be prolix and impertinent, calculated to embarrass his client and involve him in unnecessary expense; it devolves upon the party to whose prejudice it is to object to it, and the judge would not of his own mere notion interfere to alter the record; do you think there might be an arrangement in Scotland to make it the duty of the counsel, to whose client's prejudice this prolixity occurs, to object, and then the judge to declare his opinion?—It is perfectly competent for the agent to put the case to the roll, and then for the council to call the lord ordinary's attention to the objectionable part of the record, and to request that it be expunged; but that prolixity in the record is often not prejudicial to the other party, except that it may occasion him expense if he loses the cause; he has very often no interest to object to it, although it is irregular and ought not to be there. At the time when the Judicature Act was passed, in 1825, there was no experience of preparing records in a strict manner, and it was with a view to introduce a proper system into the courts that this superintendence was given to the lord ordinary, and I think it useful that it should exist; I have said that I think the records are improving, and there is less occasion for the exercise of it, and that it is competent for the parties to object.

1496. Independently of the party objecting, it is part of the duty of the judge to look at the record and see that it contains nothing impertinent?—Yes.

1497. Do you think, with safety to the purity and propriety of the proceedings, it might be devolved upon the counsel to object, and that the judge should not be called upon to take any trouble upon the subject?—I think that would be hardly safe, yet, at least.

1498. It would, in your opinion, come by-and-by to be pretty much the same as if the record were left wholly to counsel, from their becoming more expert, and the business more resuming the regular course?—That is my anticipation.

1499. *Mr. Wallace.*] Are the inner houses occupied in any formal or routine business of a similar nature to that of which you have been speaking, and of which, in your opinion, they might be relieved?—There is no preparation of records in the inner houses; when they wish additional matter to be put on the record they generally remit to the lord ordinary to have that put on the record in proper form.

1500. The question related to any formal or routine business which, it has been alleged, does exist in the inner houses, and of which the judges might safely be relieved?—I am not aware that there is any business in the inner houses that the judges might be relieved of, or that ought not to be done by the judges; but if any particular business is specified, and the person on whom it is proposed to devolve it, I shall express my opinion.

1501. Is there any species of business which is performed now by the judges

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of the inner house which might be devolved upon the outer-house judges as single judges?—None has occurred to me as more proper for the outer-house judges; but if I am asked of any particular business I will give my opinion: I have heard opinions expressed that there are some applications made to the inner house, such as for the appointment of judicial factors, or under the late Entail Act, for exchanges of property, so formal that they might perhaps be made before the lord ordinary, but I am inclined to think that where there is an exercise of discretion by the court, it is better to have the application made in the inner house than simply before the lord ordinary.

1502. *The Lord Advocate.*] You are not aware of any large, important class of business, now transacted by the inner house, which might be transacted before a lord ordinary?—No, but if any class is mentioned, I will give my opinion whether it is of that character or not.

1503. *Mr. Wallace.*] The question did not relate to any important business, but whether there were matters of a trivial and light nature of which the judges of the inner houses could be relieved; I understand you to say, you think there are none?—None occurs to me; but if any particular business is mentioned, I will give my opinion.

1504. It has been stated before this Committee, that very frequent and considerable interruptions take place in the progress of causes, on account of counsel not being able to attend; are you aware of that being the case?—I am aware that it frequently happens that counsel who are called, either before a lord ordinary or before one of the inner houses, may be engaged in a cause before another lord ordinary, or before the other division of the inner house. In the inner houses there is generally a junior and a senior counsel, and the rule is, that either shall be ready to go on who happens to be present; and unless both parties concur in delaying the cause, the court requires that the counsel who is present shall go on, notwithstanding the absence of his senior. If both concur in delay, the court, I think, seldom refuse it. If both the counsel who should be in attendance are engaged in the outer house, when a cause is called in the inner house, that is not a ground for delay. The inner house has the preference.

1505. Then it frequently happens in the inner house and outer house that causes are broken off, by the counsel being called upon to attend other bars?—It frequently happens that the cause is delayed, and another cause is called on that account; it sometimes happens that the case is broken off for the day, but I would not say that that is very frequent in the inner house.

1506. Have you ever known a cause broken off in the outer house, because the counsel were called away?—Yes; I have known many instances of that.

1507. Is it not complained of that hearing causes at short intervals, by snatches, in that sort of way, is both inconvenient to the judge and the counsel?—It is inconvenient I should think to the judge; it is for the convenience of the counsel, in a great measure, that it is done; but at the same time I may say that the business before the lords ordinary, as far as I know, is upon the whole satisfactorily done, and it is there that the interruption alluded to most frequently occurs.

1508. Are you aware of counsel ever having been divided or classified so as to appear at particular bars only?—No, it has not been so since I came to the bar, nor am I aware that it has been so since the existence of the bar.

1509. *Mr. Serjeant Jackson.*] Do you think it would be practicable, having reference to the quantity of business, and having reference to the gentlemen practising at the bar, to make a division of that kind to confine counsel to particular courts?—It would be practicable, but I think it would not be a good thing to do; I think the business is not such as would enable you to obtain persons of the same qualifications, if you were to divide it in that way; and I think the evil that exists in that respect, if it were a serious one, would necessarily cure itself, because there are plenty of able counsel who could be got. I do not see any difficulty in that. If parties choose to retain a particular counsel, they cannot expect to have him in every place at once, but I am not aware that any real evil results from the state of matters.

1510. When I said practicable, I merely meant consistently with the public good?—I think it would be against the public good to make such a regulation.

1511. There is not business enough to make it worth while for men of great eminence to pursue the profession, if they were circumscribed to a single court?—I think not.

1512. *Sir W. Rae.*] And you could not supersede special retainers, even suppose a counsel to be attached to one division; that is, the English practice?—I believe so, but I do not speak from a certain knowledge of that.

1513. From



1513. From the state of your bar, would it not frequently happen that men of eminence would be so retained if there were a division of counsel?—I think so. *Duncan M<sup>c</sup>Neill,*  
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1514. *Mr. Wallace.*] It has been stated before this Committee that six courts sit on the same days and during the same hours?—Yes; four lords ordinary and the two divisions of the inner house; the lords ordinary begin their sittings at 9, the inner houses begin their sittings at 11; from 9 to 11 the lords ordinary are the only court, from 11 and forwards there are the four lords ordinary and the two divisions.

1515. And there are the jury clerks who require counsel to appear before them to frame issues?—Yes, they wish to have the attendance of counsel, and that is very commonly done by junior counsel.

1516. So that counsel may be employed on the same day before seven courts?—Yes, if you call the jury clerks a court.

1517. *Sir W. Rae.*] Is that every day?—No, it is a possible case, but it is not likely that it would occur every day, and at all events not at the same time.

1518. *Mr. Wallace.*] It has been given in evidence here by a learned member of the Committee, that counsel might be employed to speak before six courts on the same day; you have allowed that it is a possible case?—Counsel may be so employed in the same day, but that the causes of all come on at the same time, is a matter barely within calculation.

1519. *Sir W. Rae.*] How often do the sittings before the jury clerks occur?—The jury clerks sit almost every day that the Court of Session is sitting; they used to come at 12 o'clock,—of late they have come earlier; but the duty before them is generally done by junior counsel; sometimes a senior counsel may be brought in where there is a difficult point to adjust in reference to an issue, but the junior counsel generally attend; there is a draft of the issue made, and it is furnished to the parties, and if they think it necessary they submit it to a senior counsel; he has a meeting with the junior counsel about it, and he gives his views, and it is only rarely that senior counsel are required to attend.

1520. *Mr. Wallace.*] Is it not chiefly from the absence of senior counsel that interruptions in debate take place?—Senior counsel are more likely to be absent, because they are frequently the persons most employed, and therefore there is more likelihood of their being employed in another court at the time, than a junior counsel with fewer causes.

1521. How many leading counsel may there be at the bar just now?—I do not know what is called a leading counsel; I cannot answer the question without a definition of a leading counsel.

1522. *Mr. Serjeant Jackson.*] Whoever happens to be the senior counsel, in a particular case, is called the leading counsel?—Except the Lord Advocate and the Solicitor-general, and Dean of Faculty, we have no distinction of rank beyond the number of years' standing at the bar.

1523. *Mr. Wallace.*] Is not the definition of leading counsel perfectly understood and well known at the Scotch bar?—That leaves me where I was. I have seen a counsel in great employment acting as junior to a counsel in much less employment. We have no silk gowns except the Solicitor-general and the Lord Advocate; I believe persons with silk gowns lead at the English bar; but in Scotland, if two counsel are engaged in a cause, one is senior and the other is junior; leading is not the term we use. With us the junior counsel speaks first; he makes the full statement of the cause, and in that sense may be said to lead.

1524. *Mr. Serjeant Jackson.*] How many counsel have you generally in a cause?—Generally two, sometimes three, sometimes only one; I have seen four counsel retained.

1525. Have you no rule upon the subject?—No.

1526. It depends upon the client, and the importance of the cause?—Yes.

1527. Is there any rule in the Scotch court, as to the number of counsel they will hear in the case?—They generally hear two counsel on each side, if two wish to be heard.

1528. Except it should be a case of great importance, they do not hear more than two counsel?—No, I do not recollect of ever hearing more than two counsel speak on a side; except—my impression is, that in an argument on relevancy, in the Court of Justiciary, a long time ago, in the case of M<sup>c</sup>Kinlay, there were more than two counsel heard on one side.

1529. *Sir W. Rae.*] Probably in that case there were more than two parties interested?—Yes, I think there were; but I cannot tax my memory with the fact of

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more than two counsel on each side having been heard in the Court of Session in one hearing.

1530. *Mr. Wallace.*] You have stated that you did not see any way of classifying counsel?—I said that I thought it was practicable, if you made a law upon the subject; but that I did not think it would be a beneficial thing, and that if there was any evil in it, the evil would correct itself, because parties have an opportunity of employing counsel less occupied.

1531. It has been stated before this Committee, that printed cases are very frequently ordered now, but not so much as formerly; is this practice most general in the outer or inner chamber at present?—I cannot say. Printed cases are not frequent in the outer house; the cases there are generally written; but with reference to orders for cases, whether printed or written, I cannot say whether the orders are more frequent in the inner or the outer house; probably there are some returns which will answer the question. A judge in the outer house, when there is a case of importance, sometimes reports it to the inner house, without pronouncing a judgment upon it: he says, "This is a case of great importance, and I should like, therefore, to report it to the inner house, and for that purpose I should wish the parties to prepare cases, and I shall transmit them, with my views generally, without a judgment, to the inner house;" if you take that as an instance of an order for cases in the outer house, I should say the order was more frequent in the outer house; but I am not prepared to answer the question positively.

1532. *Dr. Lushington.*] That is only done by the lord ordinary in cases of difficulty and importance?—Yes.

1533. *Sir W. Rae.*] Do the parties often request the lord ordinary to adopt that course?—Sometimes; I would not say often.

1534. *The Lord Advocate.*] Have you found that parties have requested the lord ordinary to order cases, in the belief that that would insure the best hearing of the case in the inner house?—Yes.

1535. *Sir W. Rae.*] Do you think cases are ordered more frequently than is requisite or desirable?—No, I cannot say that I think so; I have seldom known cases ordered where the opinion of counsel did not concur with the order of the court.

1536. The bearing of the last question but one put to you would be, that counsel are anxious to have cases ordered, in order to have the case fully judged of in the inner house?—Yes, to call attention to it as a very important matter, and to enable and induce counsel to go fully into the argument and bring their authorities to bear, and to obtain from the judges a more deliberate and mature consideration and opinions upon the papers so prepared, and which are to be studied at home, than would be obtained simply upon oral statement.

1537. *Mr. Wallace.*] Seeing that the intention of the Judicature Act, and the general desire is understood to be favourable to parole proceedings, do you yourself approve of ordering cases, as a good practice, and which ought to be frequently indulged in?—I should say that the ordering cases ought not to be the usual course of proceeding by any means; it ought only to be on particular occasions that cases should be ordered; sometimes points are intricate, and require much research, or perhaps involve a certain measure of statement of figures, which can be followed better when put in print.

1538. *Dr. Stock.*] When there are cases put in on both sides, does each party bear the costs of those cases?—It is part of the costs of the suit.

1539. *Dr. Lushington.*] In causes which come up by appeal to the House of Lords, are you not of opinion that it is absolutely necessary, that, in that case, there should be written arguments upon the questions to be decided?—We have always been used to consider written arguments as important for the House of Lords, with a view to lay the case fully before them. Before the Judicature Act there were full cases printed for the House of Lords, whatever had been the length or course of discussion in the Court of Session. The Act of 1825 directed, that if there had been cases ordered in the Court of Session, those cases should be embodied in the papers that were laid before the House of Lords, and such supplementary matter as might be thought proper; therefore I should say, that the Judicature Act, which had for its object, in a great measure, to abolish a great deal of written argument in the Court of Session, did sanction the laying a full written argument before the House of Lords.

1540. Are you not of opinion that it is essential for the well understanding of a case that comes to the House of Lords, that there should be a written argument upon the law, which must be to some of the judges foreign law?—I think it is.

1541. *Mr.*

1541. Mr. Serjeant *Jackson*.] And likewise to counsel, who are not perhaps always so conversant with the Scotch law?—Yes; at the same time I have seen appeal cases in Scotch causes drawn by English counsel as fully as if they had been drawn by Scotch counsel.

1542. But, generally speaking, your own bar must be more fully cognizant with Scotch law than the English lawyers?—Yes.

1543. Mr. *Wallace*.] But, generally speaking, you think cases ought not to be ordered except in peculiar instances?—I think it ought not to be the ordinary course of things, or a matter of course.

1544. Mr. Serjeant *Jackson*.] Do you apprehend that it is the practice in Scotland to have cases ordered too frequently?—It does not occur to me that they are ordered too frequently; I think that generally the opinion of counsel goes along with the judges in the ordering of cases; there may be instances in which cases are ordered where counsel have thought it unnecessary, but I do not think that is common.

1545. The *Lord Advocate*.] Your answer has reference to the ordinary mode in which cases are disposed of by the court?—Yes.

1546. If the court were in the habit of dealing with cases at greater length in oral argument, ought not that to dispense with the ordering of cases to the extent that they are ordered?—I think if our habit was to argue cases more fully in the inner house than we do, the ordering of cases in the inner house might probably be less frequent than it is.

1547. Mr. Serjeant *Jackson*.] Do you think the practice of ordering cases is increasing or rather diminishing?—My observation does not enable me to answer that question satisfactorily; I really cannot say; I am not struck with any particular difference.

1548. It would rather strike you that it goes on upon much the same average?—Yes.

1549. Dr. *Lushington*.] Is the number of cases ordered regulated by the importance of the causes that arise from year to year?—Yes.

1550. Dr. *Stock*.] When the lord ordinary orders a case for the information of the inner house, is the hearing of the inner house delayed, or is there always such an interval between the order of the lord ordinary and the hearing of the inner house, that cases may be readily prepared?—When the lord ordinary pronounces a judgment, a certain time is allowed, within which the party may consider whether he shall bring it under review or not; that time is 20 days; if, instead of pronouncing judgment, the lord ordinary orders cases, he fixes a time for giving them in, they would not probably be ready in 20 days.

1551. Dr. *Lushington*.] Are not cases in the courts in Scotland ordered under three different sets of circumstances; the first instance, where the lord ordinary directs cases for his own information, intending to pronounce a decree, in the cause; in the second instance, where, not intending to pronounce a decree, he reports the whole to the inner house, and orders cases; and, in the third instance, where, having himself decided the question without any case, the inner house thinks fit to order cases for its information?—Precisely so.

1552. Mr. Serjeant *Jackson*.] And when the inner house feels it necessary to have cases stated to them, is it the province of the outer house to see that those cases are properly prepared?—No, there is no control over the preparation of those cases, except the control of counsel; they are desired to put their argument in writing, and then it is printed.

1553. Then that does not go before the lord ordinary?—No.

1554. Dr. *Lushington*.] You were asked by Mr. Wallace as to the disposal by lords ordinary of matters of form in the preparation of records; in point of fact, with the exception of ordering certain corrections and alterations, is not the duty of the lord ordinary in finally preparing the record judicial duty; for instance, when the defences come in, in deciding whether the pursuer has any title to pursue or not; and, in the second instance, before the record is made up, in deciding whether leave or liberty shall be given to add any further statement or not; and, finally, he decides the case to all intents and purposes as the judge?—Undoubtedly, he does all that you have now mentioned.

1555. If it has been stated by any witness that there are mere matters before the lord ordinary in the preparation of the record which could be as well done by the clerk, do you agree in that opinion or not?—I do not think that any of the business you have alluded to, or that is done before the lord ordinary could be as well done by the clerk; but there is business done by the lord ordinary that

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you have not alluded to in the course of preparation, which is this : when a paper is put in, say a condescendence, which is a statement by the pursuer in the cause; an answer is put in by the defender; then a time is to be appointed for putting in the revised paper; the cause is enrolled, and the lord ordinary fixes the time, and then if it is found impossible to prepare the revised paper within that time, or if the interposition of the court is wanted to compel the production of writings, the lord ordinary is asked to give more time, or to give authority for the production of such writings,—those are all steps in the preparation of the cause, but they require discretion, and may be most important; I am of opinion that, whenever a matter may be made a subject of contest between the parties, such matter ought not to be disposed of by any but a judge.

1556. It could not be left to the clerk to decide?—I am clearly of opinion that it could not.

1557. Dr. Stock.] Some of the witnesses have stated that there are matters of mere form that might be despatched by the clerk, corresponding to side-bar rules in this country?—No doubt, where a motion for giving longer time to lodge a paper is not opposed, and there is nothing to be said but “grant;” any body may say that, but you are not sure that it will not be opposed; it may be opposed upon reasonable or unreasonable grounds, and where an opposition is made, it is the province of a judge to decide. Moreover, I think it an advantage that the judge who is eventually to decide upon the costs in the cause should see how the parties have conducted themselves in the preparing the cause. He sees whether a party has been fairly or unfairly exposed to expense; and having observed the reasonableness or unreasonableness of the opposition to certain steps, he may say, “I disallow that part of the costs;” I think it is right that that should be placed under the judge.

1558. Mr. Serjeant Jackson.] Is there any portion of the practical working of a cause of which it can be said, *à priori*, that it may not be open to controversy?—I think it is difficult, unless the parties have a meeting beforehand, to anticipate of any part that it may not lead to controversy, and if it should not, so little time is occupied with it, that there would be nothing to signify gained by taking the duty off the judge.

1559. Dr. Stock.] The pleadings, the condescendence, and the revised condescendence are all prepared by counsel; is it the general tendency at the Scotch bar to aim at framing those in as brief and concise a manner as possible?—We have been aiming at it since the form was introduced in 1825; and I have said already, in answer to some questions, that I think we are improving in the mode of doing it.

1560. Dr. Lushington.] Considering always that the Court of Session is a court both of law and equity united, is it not impossible to state the facts alone; do you not require a further statement to elucidate the case?—In our condescendence we state the facts, and we also add the propositions of law, which we think important, and upon which we are to base our argument.

1561. I will read an extract from the First Report of the Law Commissioners. “It has been suggested by some, as a remedy for these evils, that the record should in all cases be confined to the mere substantive and cardinal averments upon which the case ultimately rests, and that no particular details should be admitted. We are, however, after much consideration, clearly of opinion, that this suggestion cannot be adopted. A very important consideration in this question has not always been duly attended to, that the Court of Session is a court both of law and equity, and that there are not with us, as in England, separate courts for the decision of different classes of cases. In the common law courts of England every case necessarily goes to a jury.” Then the Commissioners proceed to state that, “This would be an evil of the first magnitude;” do you agree in that observation?—I agree generally in that observation. I think records might be made a great deal too brief to be useful, and they may also be made a great deal too prolix; I think that in the statement some information must be given to the opposite party.

1562. Dr. Stock.] Generality may be a means of fraud, by disguising the case?—Yes, and it does not accomplish the object, which is, that the parties shall meet each other by statements, and that the court shall know what the statements of parties respectively are.

1563. Mr. Ewart.] At the Scotch bar you have more written argument than at the English bar?—There is no argument in those papers we have been talking of; if the court want written argument, they order cases. The question as to the records

records arises more upon the point, with what particularity you are to set forth the facts of the case, whether you are to set forth general propositions of fact, or some of the details of those facts.

1564. Sir *C. Grey*.] Does it not appear to you that it would be an improvement, if it is practicable, that the record should ascertain the whole of the facts before the legal arguments, or legal propositions are founded upon it?—The record does contain the whole of the facts of the case; the legal propositions are at the end, and follow the statement of facts.

1565. The facts are merely alleged; would it not be desirable, if it were practicable, and do you think it would be practicable, to have the whole of the facts ascertained, as far as they are to be ascertained, in the suit, before any legal arguments or propositions are brought upon the record?—I do not think so; I think when parties see the legal propositions of each other, some of the facts are ascertained to be unimportant; then the court will consider whether there may be enough of facts admitted to enable them to dispose of the cause; if parties were, in the first instance, set to prove the facts, they might prove a great many things which were unnecessary to the cause, and that would lead to great expense unnecessarily.

1566. Is it the practice, in preparing the record before the lord ordinary, that the parties are subjected to questions, in the same way as in equity; can you sift the conscience of the party, as the expression is; for in equity a number of questions are put, which each party is called upon to answer, and that is different from the practice in courts of law?—In our records, a party states his averments in point of fact in separate articles, first, second, third and fourth, and each of those must be separately and articulately answered; for instance, the pursuer may say, that on a certain day he delivered a certain deed to a certain person; then the other party must answer “Yes” or “No” to that article; he must say, “Admitted,” or “Denied;” or he may admit it with qualification; he may say, “Admitted, but that party was not my agent.”

1567. Mr. Serjeant *Jackson*.] Is that upon oath?—No, it is part of the answer drawn by counsel.

1568. He must admit it or deny it?—Yes, if it be a matter properly within his knowledge; but he may give some explanation; if he passes it over without any denial or explanation he is held in law to admit the fact.

1569. The legal effect of denying the fact is to put the party upon the proof of it?—Yes.

1570. If it is admitted, it supersedes the necessity of proof?—Yes.

1571. Is there any penalty upon false declaration?—No other penalty than that of costs; a party, by denying what is truly averred, puts the other party to the expense of proving it, and that is checked by the circumstance that he may in the result have to pay those costs.

1572. Sir *W. Rae*.] What is your opinion as to any scheme for equalizing the duties among the lords ordinary?—I have not heard any scheme propounded that was satisfactory to me upon that subject; I think it is hardly possible to expect that there will be precise equality among the lords ordinary in point of business; some are greater favourites than others.

1573. Dr. *Stock*.] Suppose there was a rota?—It would certainly be possible to make the causes go in rotation.

1574. Sir *W. Rae*.] Is it your opinion that that would be expedient?—No, I am not prepared to say so; during my experience at the bar parties have had, more or less, the choice of the judges, and the principle is so much interwoven with our notions that I think it would be unsatisfactory to alter it. It has been extended of late by the Act of 1838 in this respect, that now the party may choose both the outer-house judge and the inner chamber to which he will take the case. Formerly, the lords ordinary were attached to particular chambers; if you selected a lord ordinary you necessarily went to the chamber to which he was attached.

1575. Mr. Serjeant *Jackson*.] Considering, on the one hand, the advantages which might be derived from a rotation of the kind which has been suggested, and, on the other hand, the disadvantages of such a change, which way does your opinion preponderate?—I think the great latitude of choice that exists at present is a matter upon which there may fairly exist difference of opinion; the inclination of my opinion is to approve of the principle of parties having a choice.

1576. Do you think that, by and by, in that particular there will be an improvement in the administration of justice, and that the preference for a particular judge

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will not be so great?—I think the evil, if it is an evil, is calculated to remedy itself, because though there may be a preference for a particular judge, yet there is a desire for speedy justice by a pursuer, and he will weigh the disadvantage of waiting for some time for a judgment against the advantage or disadvantage of going before another judge and obtaining a more speedy decision.

1577. In some cases some of the judges have a great deal too much business?—Yes; more than they can overtake.

1578. Some of the lords ordinary have not enough to occupy them?—No; some of them have no arrear at all, and could do more business considerably.

1579. Sir W. Rae.] We have had a good deal of evidence about the notes of the lord ordinary; do you think that those are useful in the administration of justice?—I have heard different opinions upon that subject, and there are advantages and disadvantages attending them; I should not like to have the notes done away with.

1580. Do you think it would be desirable that the nature of those notes should be in any respect changed?—It is very difficult to prescribe as to that; some of the judges go more fully and argumentatively into the case than others; one judge whom we lately had, made notes, which might be considered almost models.

1581. Those notes go along with the case to the inner house; do you think that they have a prejudicial effect there?—I think they have both advantages and disadvantages there; they go there as the argument of a person of weight and authority, as a judge in the outer house is, against the party whom he has decided against; and the argument in support of his opinion is submitted to the judges of the inner house without any argument for the other party to meet it. On the other hand, they make the party against whom the judgment is pronounced fully aware of the grounds upon which that judgment has proceeded, and enable that party to combat the grounds, and, if he can successfully combat them, to cut away the foundation of the judgment. If there be a fallacy in the reasoning by which the lord ordinary has arrived at his decision, it is more easily detected by seeing the note than if you had merely the judgment.

1582. Does it appear to you that they have a prejudicial influence upon the judges of the inner division in deciding the cause afterwards?—I cannot say that a practical evil has resulted from it; we are more anxious to combat the views of the lord ordinary, because they are stated to the judges in the note, than if they had been merely expressed orally in the outer house; the argument of the lord ordinary must weigh more or less; you have to combat that of course.

1583. What is your opinion of the extent of preparation which the judges make use of in preparing at home previously to coming into court?—I do not know how much time they devote to that preparation; but I have no doubt they must devote a great deal of time.

1584. In the opinion of some it has been stated that they should not read any of the papers before they come into court; and in the opinion of others they read too much; what is your opinion?—I am of opinion that the judges cannot know too much of the case judicially; I do not object to their reading the pleas and facts; I would rather address such a judge than one who was ignorant of them; probably the speech that I would make in the one case would not be so satisfactory to my client if he was present, because it might not be so full as in the other; but I would rather address a judge who I thought was aware of the nature of the case, and could separate the relevant from the irrelevant matter.

1585. Mr. Ewart.] Suppose a judge is fairly disposed, it must be an advantage to him?—I think so; but when the Act of 1825 was passed, I did anticipate that persons who had not been accustomed to the mode of discussion introduced by that Act would be very apt to form opinions more decidedly from the papers than they ought to do before hearing the oral pleading; that opinion I expressed at the time the Judicature Act was passed, but I think the grounds for it are now wearing away.

1586. Sir W. Rae.] As regards the due administration of justice, do you think the judges are more prepared than they ought to be from reading the cases?—I do not think the judges come into court more prepared than they ought to be.

1587. Mr. Ewart.] Do you think there is any undue suppression of *viva voce* pleading?—I have expressed my opinion upon that subject pretty fully; I have said that our habits had been such as have induced us to limit the discussion in the inner house more than is done in the outer house, or in the House of Lords; that the habit, both as regards the bench and the bar, is wearing away, and that I would like to see it more wear away.

1588. It

1588. It has been stated by some of the witnesses that they think the judges do not always read their cases beforehand; do you think if the inner houses heard causes more on the *vivâ voce* system it would give more satisfaction to the suitors, not only on account of the oral pleading being more extended, but because the surmise or suspicion which some of the witnesses have stated to exist would not then exist?—If such suspicions and surmises exist, I think the ground for them would be very much removed by people who entertain those suspicions knowing that the case is fully stated, and in the hearing of the judges; I do not think there is a want of attention in the judges in reading the papers, but it would give a security, certainly.

1589. The *Lord Advocate*.] Do you think the judges of the Court of Session state the grounds of their opinion in giving judgment generally at sufficient length; are there not cases in which you think it would be desirable that there should be a fuller statement made of those grounds?—There have been cases in which I should have liked a fuller statement; I think that is in a great degree cured.

1590. Are you aware that it has been the subject of remark in the House of Lords, that in several cases there has been a want of information of the grounds upon which the judges have gone?—Yes; I was of counsel in one case, and I rather think that your lordship was counsel with me, where it was thought on all hands that there was a want of a full statement of the grounds of the opinion. I think it is satisfactory to hear the grounds of opinion stated; and I think, that of late, and especially since the date of the case I allude to, it has been done more fully than it used to be, and within the last year or two there is very little ground of observation upon that subject.

1591. Mr. *Wallace*.] In which division was that cause heard?—In the first division of the court, about two or three years ago; it was a suit between relatives; and the court were of opinion that it had been a sort of amicable suit, and they did not think it necessary, therefore, to go into the grounds of the opinion; I do not, however, think that that is a sufficient reason for not giving the grounds of opinion.

1592. Dr. *Stock*.] Has the want of explicitness in the judges in delivering their judgments been, in your opinion, a cause in any and what degree of multiplying appeals to the House of Lords?—I think it must, in some cases, have led parties to appeal, if they heard no satisfactory grounds given for deciding the cause against them, and had a good opinion of their own cause; but I cannot speak to any degree of effect that it may have had.

1593. With respect to cases which are not tried by jury, there are two modes of taking evidence, one by commission, and the other by examining witnesses in court; is it your opinion that if witnesses were examined *vivâ voce* in court, that would tend to the despatch of business, and diminish the labour that is now imposed on the judges?—I do not think it would tend to the despatch of business, or to the diminution of labour, if the witnesses were examined in the presence of the court. The court could do nothing else, when listening to the evidence; it would take longer in that way than if the evidence was taken by commission and read by the court; at the same time, undoubtedly, a judge who hears a witness examined is in a better condition to give due weight to his testimony. Proofs upon commission are not very frequently taken, unless both parties are disposed to consent that they shall be so taken, except in consistorial cases, where there is a particular regulation for taking them by certain persons appointed for the purpose.

1594. In ordinary cases, is it in the discretion of the judge to select?—There are certain classes of cases enumerated in the Act of Parliament, which must be sent to a jury; where a case is not so enumerated, it is open to the judge, and the disposition of the judges is to send the case to be tried before a jury; with some of the judges that disposition is particularly strong.

1595. Sir *W. Rae*.] In other cases it is done by commissioners?—Yes.

1596. There is no such thing as the judges examining witnesses?—No.

1597. Dr. *Stock*.] Is there any set of cases in which it is competent for the judge to examine witnesses in open court?—It is not done; there may be cases of complaint for contempt of court in which it would be done, or where a party is brought up to be examined, but it is not a mode adopted of investigating a case in the Court of Session; it is not in our practice. It is not incompetent for the judge to order up a party for examination, or, perhaps, a particular witness for examination, but it is not a thing that is done in ordinary practice.

1598. Then you can hardly form an opinion of the consequences of introducing such.



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such a system in diminishing the amount of labour of the judge?—Having been for ten years a judge in a provincial court, where proofs are taken before the judge, or a commissioner, not a jury, and having also acted as a commissioner in taking proofs, I can form some idea of the consumption of time in taking proofs in that way.

1599. Mr. Serjeant *Jackson*.] When a cause proceeds in the Supreme Court, and a matter of fact is to be decided by the judge without the intervention of a jury, the uniform course is to take the evidence upon deposition?—Yes.

1600. But in the discretion of the judge, there may be an exception to that?—He may order up a party for examination, and I am not sure whether a judge might not order up a witness to be examined or re-examined, if he entertain doubt upon his evidence; but I do not think he would do it; he would remit to a commissioner.

1601. Dr. *Lushington*.] Is it very common for the judges to take evidence by commission, except in consistorial cases, and cases of that description?—It is not very common, but there are several cases in which it is done; for instance, where there are one or two witnesses only to be examined, and the parties think it will be better and cheaper, and more expeditious, to have a commission to examine those witnesses than to go to a jury, they then have a commission. In the inferior courts there is a great deal of evidence taken in causes that afterwards come unto the Court of Session.

1602. Dr. *Stock*.] Jury cases are allowed to be very uncommon in civil causes, how then are the facts ascertained where there is neither jury trial nor commission?—There is no other way of ascertaining the facts in the Court of Session, except by admission of the parties on the record, or a reference to the documents which establish them, or a reference to oath of party.

1603. Mr. *Wallace*.] In reply to a question whether or not the examining of witnesses in court is known to the practice of the law in Scotland, you stated that it was not, except in jury cases; are you not aware that a great number of cases are tried under the Small Debt Act by the appearance of witnesses in every case?—Yes, and those are cases of small amount that come before the sheriff or justices of the peace, and are finally decided by them. There are cases of greater amount that come before the sheriff, where witnesses are examined either by the sheriff or a commissioner, and which cases, after being decided by the sheriff, may be appealed to the Court of Session.

1604. Sir *W. Rae*.] Does it consist with your knowledge that cases originate in the sheriff's court, where the evidence is taken in writing, in order to avoid jury trial in the Court of Session?—I cannot mention particular cases within my own knowledge, but my opinion is that that practice does exist; one reason for expressing that opinion is that by a section of the Act of 1825, where causes exceed in value 40*l.* before the sheriff, parties may remove them to the Court of Session if they wish them to be tried by jury; I think that causes would have been more frequently brought to be tried by jury under that section, if there had not been a disposition to avoid jury trial.

1605. Mr. Serjeant *Jackson*.] Is there no jury trial before the sheriff?—Not in civil cases.

1606. Mr. *Wallace*.] In the case of roads and canals, does not the sheriff try by jury?—Under special statutes that is done.

1607. In such cases are the courts of the sheriffs of Scotland found so far competent as to give general satisfaction?—I believe so; I am not aware of dissatisfaction; we have had a good many such trials lately, in regard to railroads and the like.

1608. Mr. Serjeant *Jackson*.] Those are questions upon assessing damages?—Yes, questions of that kind.

1609. The *Lord Advocate*.] Those are trials in which no bills of exception are allowed?—None.

1610. You cannot infer, from the mere practice of jury trials before sheriffs in those cases, the propriety of introducing the whole system of jury trial before sheriffs?—No, that would be too narrow ground for the inference; but I have an opinion upon that subject.

1611. Sir *W. Rae*.] Will you state your opinion of the expediency of the sheriffs trying cases by jury trial?—My opinion is against it.

1612. Mr. *Wallace*.] It appears in evidence before this Committee that parties taking appeals from sheriffs' courts for review before the lords ordinary, select those judges having most business upon their rolls, on purpose to delay the decisions of actions; have you, in your experience as sheriff, or professionally, any knowledge



knowledge of the truth of this allegation?—I have no knowledge of particular cases, but I think it is very natural for a party defender, who has lost the cause in the sheriff's court and who expects to lose it again, to take all the means that he can to delay the decision as long as possible.

1613. Is the record that has been made up in the sheriff's court used before the Court of Session?—It is; it may be amended if it is thought imperfect, but it comes there and is frequently used. There is almost always an additional statement of pleas in law.

1614. Are you aware of the allegation of jury trial in civil cases being very unpopular in Scotland?—It has not succeeded so well as its friends wished, or so well as I could have wished and expected at the time.

1615. Did your experience as sheriff, being a judge frequently trying criminals with the aid of a jury, show you that there was any dislike to jury trials in criminal cases?—I am not aware of any dislike to jury trials in criminal cases.

1616. Did you ever hear any objection made to that mode of trial in criminal causes in the large county of Perth?—No, I never heard objection taken to that, except that I have heard jurymen complain of the burthen of being called together; but of the system of jury trial I approve.

1617. You have already stated that Perthshire is one of the largest counties in Scotland; does not the county of Perth contain a great number of gentry and inhabitants of towns, and farmers, probably as well informed as any other part of Scotland?—I fancy it does; the towns are not very large in the county of Perth. Perth is a considerable city itself, but the other towns are not large, and there are not many resident gentry in them.

1618. But still the county of Perth may be supposed to contain as large a number of well-informed inhabitants as any other district in Scotland?—I should say as large a proportion as any other rural district in Scotland.

1619. You have stated your objection to civil causes being tried by sheriffs, with the aid of a jury; have you formed that opinion on the incapacity of the inhabitants of counties to act equally well as jurors in civil causes as they do in criminal cases?—I have formed it on various grounds; in the first place, I think that civil causes are much more apt to excite interested feelings in the particular district where they occur than criminal causes; and that in a narrow district it is more difficult to get jurymen free from prepossession, in reference to local matters of patrimonial interest, than it is to get them free from prepossession in regard to criminal matters. I do not think there is any risk at all in criminal matters of any feeling of that kind. In the next place, I think that, in order to have the civil causes well tried, you must have counsel in attendance; and there would be considerable expense in taking counsel to distant provinces to try causes. Those are two of the objections that I have to it. In the next place, I think that all the sheriffs could not be expected to try civil causes and decide the points of law arising in the course of them so well as persons who have been raised to the bench of the Supreme Court. It is not to be expected that, at the time when men are appointed as sheriffs, they have the same qualification for such duties as the judges of the Supreme Court have. Finally, I think the proceedings before the sheriffs are very satisfactory as they are at present, and I see no necessity for the change, more especially as it is in the power of the parties when the sum is of the value of 40*l.*, and they wish to have a jury, to remove the cause into the Court of Session in order to have it so tried.

1620. Sir *W. Rae.*] Any failure on their part would lead to bills of exception?—It would require a machinery for bringing their judgments under review, which I have not heard suggested; I omitted to mention that.

1621. Mr. *Wallace.*] Are not the vacancies upon the bench very generally filled up from the list of sheriffs?—Yes, very often; I think it is very good training for the bench; but people are appointed of much younger years to the office of sheriff than they are to the bench, and after the experience of some more years at the bar, or as sheriffs, I should think them better qualified to try causes than when they are appointed sheriffs.

1622. Would not the fact of the judges being chosen from the list of sheriffs induce you to suppose that they are competent to try causes, with the aid of a jury?—I think many sheriffs are; but there are 30 sheriffs, and only 13 judges: the sheriffs are selected from the bar; a person of a few years' standing at the bar is eligible to be a sheriff; the judges are selected from among the sheriffs and the bar; there is a sort of double filtration, so that you may expect that the judges will be persons of greater eminence.

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1623. Are the forms of trying criminal and civil cases, with the aid of a jury, similar in Scotland?—No, they are not.

1624. Are they materially different?—The forms are materially different.

1625. Are you aware whether appeals are increasing from the Scotch courts to the House of Lords?—I do not know; there are returns, I believe, upon that subject, but I cannot speak myself to it.

1626. The arrears which exist before the lords ordinary, and the allegation of causes not being sufficiently heard before the inner houses, have led to the suggestion before this Committee of lengthening the sessions considerably, and also the daily sittings; have you any opinion to express as to the expediency of increasing the sessions and the daily sittings of the Court of Session?—The length of sittings of the lords ordinary—I mean, the periods of their sittings—have been increased of late; we have had no time as yet to judge of the effect of that experiment, as it has been recently introduced; in regard to the daily sittings being increased, undoubtedly, I think, if the oral pleadings before the inner house were of greater length, the sittings would necessarily be of greater length; I would not in that case say that the lengthening of the sittings was the cause of any thing, but rather the consequence of more oral pleading.

1627. Would an increased period of sessions for both descriptions of court, in your opinion, be likely to take away the arrears already existing in the courts of the lords ordinary?—I think it probable that if those of the lords ordinary who have arrears sat longer than they do, those arrears would, to a certain extent, be reduced, but I do not think it follows that the arrear would be done away; those lords ordinary who are favourites would be still favourites.

1628. Supposing the sittings of both the inner and outer houses were to be extended for three months in the year, what effect would that have on the present arrears, and upon the general feeling of the public with regard to the court?—I have said that I think the arrears might be in some degree reduced by longer sittings; but I do not think it would follow that the court might not be still in arrear. If the lords ordinary were deciding causes, and feeding (as it were) the inner houses with causes, of course those inner houses would still have business to do.

1629. You cannot form an opinion of what effect an additional three months' session would have?—I can form no decided opinion as to the effect.

1630. It appears from returns made to the House of Commons, that the business of the Court of Session, generally, has been diminishing for a considerable number of years; you have stated your opinion that fewer judges could not do the duty than the present number of 13; with the knowledge of the existence of those returns, are you still of opinion that fewer judges than 13, could not do the business of the country?—I have not seen the returns, but I assume the statement to be correct, that the business is diminished of late years. That does not alter my opinion that the number of judges ought not to be diminished, though I beg not to be understood as going to this length, that the present number could not dispose of more causes; the one thing is not a consequence of the other.

1631. Sir *W. Rae*.] When there is inequality of opinion upon the bench, how is the case disposed of?—By taking the opinion of the other division, or of the whole court.

1632. Upon questions of great importance, is the opinion of the whole court occasionally taken?—It is.

1633. Is considerable time occupied in discussions of that kind before the whole court?—When the cause is argued largely before the whole court, that does occupy a considerable time; it assumes an aspect of great importance, and probably requires a great deal of research; there is a full statement of the case by four counsel, and that occupies time.

1634. Have instances occurred in which days have been occupied in hearing such cases, and in delivering the opinion of the court?—Yes.

1635. Many days?—Yes, several days in hearing such cases.

1636. The decision of such a case appears in the return as one unit decided by the court, though it may have occupied some days in its disposal?—I presume so, but I have not seen the return.

1637. Mr. *Wallace*.] It has been alleged that the importance of the business brought before the Court of Session is greater now, and has been for the last few years, than it used to be; do you agree in that opinion, looking at the period in which you have been professionally before the court?—I cannot say that I see a great deal of difference; I think that there are fewer cases of little importance.

1638. Has

1638. Has not the court been relieved of a considerable portion of difficult and important business since the Reform Act?—One branch of business—questions as to freehold qualifications.

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1639. Sir W. Rae.] Was that to a great extent?—It was to a considerable extent periodically; about the time of elections there was a good deal of business of that kind.

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1640. Mr. Wallace.] Has a considerable portion of the former business of the Court of Session devolved upon the sheriffs of late years, in consequence of various Acts of Parliament?—There have been some cases of cessio bonorum and sequestration.

1641. Must not that have considerably lessened the business and the duty of the judges?—In some degree; but probably not in so great a degree as you might suppose from counting the number of sequestrations; all questions arising in the course of sequestrations did not come before the court originally; great discussions were before the trustee, and an appeal lay from the trustee to the court; now the sequestrations are conducted before the sheriff, and there are appeals from the sheriff to the court; we have not had an opportunity of judging of the effect of that; it came into operation this year; I was in one case this spring of an appeal from the sheriff's decision.

John Hope, Esq., Dean of Faculty, called in; and further Examined.

1642. Mr. Wallace.] I UNDERSTOOD you to say, that no part of the time of the judges when sitting in the inner chamber, is taken up by proceedings which could be dispensed with; do you consider it necessary that four judges should be occupied in listening to routine proceedings, which, in point of fact, are conducted by a single judge—the president of each division?—I mentioned that the period of time that was occupied in what appears to be embraced in the description of business called routine business, was so short, that it does not occupy, comparatively speaking, any great proportion of the time that the judges sit; but that though there is a portion of the routine business, and a portion only, done by the president, that yet there occur continually and frequently points on which he is obliged to refer, and does refer, to the other judges; the note that is put in may be a matter totally unimportant; it may be a matter, that he says, upon looking at it, “I suppose there is no objection to it;” but it may turn out to be one to which the opposite party immediately objects, and on which there is a long discussion; in that case, therefore, the matter is not routine, but matter important to the cause. Another part of that routine business consists of a very important description of cases, namely, under such statutes as the Entail Improvement Act, where it is particularly the business of the President of the Division to see that the terms of the statute have been complied with, but in performing which duty of course he is obliged to refer very frequently to the other judges, and in which discussions may arise of great importance. I am not aware of any loss of time caused by that; I am not aware, on the other hand, of anything that could be called routine business in a cause that *a priori* you could say could be devolved upon one judge, or upon clerks. Perhaps the honourable Member would be good enough to mention the particular sort of business, as I may not understand what is meant by routine business; if there is any misapprehension it will be understood that I should be very anxious to have my attention called to any sort of business that is described as routine.

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1643. You have stated that there is no kind of business of form or routine which could be conveniently taken from the judges?—Most certainly.

1644. It appears from the annual Parliamentary Returns, a copy of which is on the table, that including cases decided by jury there were 524 final decisions pronounced in the year 1831, and 321 only in the year 1839, showing a decrease of 39 per cent. in the last nine years in the business of the inner chamber: if I understand the evidence you gave the other day, you are not aware of any material decrease having taken place in the extent of business in the Court of Session?—Having just corrected the first part of my evidence given the other day, I find that I stated expressly that there had been for the last three or four years a decrease, and as far as my experience went, considerable, but that I had never looked into the returns, and only knew it from general experience, therefore there is some misapprehension in regard to my former answer.

1645. It has been alleged that though the number of causes may have decreased considerably of late years they have risen in importance in no less proportion, so

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as to occupy the court as much as formerly. Are you of opinion that the importance of the business has increased of late years?—I cannot say that there is any difference in the importance of the business at one period or another. I recollect a number of important causes in the course of last year; whether there were as many in the course of the year before I cannot tell. I would not wish to say that business at one period was more important than at another. This difference there is, since the change made by the statute of 1825, viz., that every decision pronounced by the inner house is final, and therefore of far more importance. Every case, therefore, comes before them in a shape and form which makes the duty of deciding it more onerous than before the statute of 1825. But I by no means wish it to be stated as my opinion that at one period more than another there is more important business. I am not aware that the causes of 1831 were less important than the causes of this period, or that the causes recently are more important than those of 1831. I cannot say that I have the least recollection upon the point. It would require to look over the whole bulk of the reports. I would beg likewise to say, that the longer one gets habituated to the practice of the profession, perhaps one estimates less the importance and difficulty of cases you have to argue, than when one begins to act as senior; the causes in which you are then retained appear to be very arduous, and may lead persons to say that those cases were of more importance, or the cases of late years more important, according as one is of more or less standing in the profession.

1646. The object of this Committee being to ascertain whether or not any of the present number of judges can be spared, I wish to draw your attention to the fact of there having been several of the judges of the inner houses absent from court. In the first place, you are aware, that the Lord Justice Clerk was absent from illness, during the greater part of the long winter session; and that Lord Glenlee, although afflicted by great age, with deafness and other infirmities, was the presiding judge in the second division: these being facts which are not disputed, I wish to inquire if you are aware of any complaint having been made of the manner in which the business under such circumstances was performed, or that there was any increase in the arrears of that court?—The question appears to embrace three different things; first, as to how the facts bear upon the reduction of judges; secondly, as to how the business was discharged during the period in question; and thirdly, whether it produced any arrears of business. In the first place I will answer the second and third points first, which seem to be incidental, and not of permanent importance. I beg leave to say, in the first place, I never heard any complaint made as to the manner in which the business was done, and I do not admit that there was any such deafness, speaking from my experience, on the part of Lord Glenlee, as to create any just ground for dissatisfaction. One of the last cases during that period that he heard was a motion for a new trial, which was argued by my learned friend, Mr. McNeill, and myself, at great length; he was unexpectedly called upon by the other judges to deliver his opinion first, and he went over every point in the statement made for a new trial. I allude to the winter of 1839-40, the period referred to, showing that whatever deafness he laboured under (and certainly he was afflicted with a certain degree of deafness), did not in the least degree incapacitate him from presiding in the court. He had never been in the habit of presiding; but there was no inconvenience from that cause. I am not aware that that produced any arrear of business whatever. On the other hand, with reference to the first point, I beg leave to say, most distinctly, that I think great inconvenience arises from the absence of one of the judges. I think the court does not act with the authority that it ought to have when it sits with three judges only; the case may be decided by a majority of one judge in the inner house, while, in reality, if you count the lord ordinary, the judgment is that of two against two. I think, therefore, that the greatest possible inconvenience arises from the absence, from indisposition, of a judge. That was one of the reasons which leads me to think that the reduction of the number of judges from four to three would be an inexpedient measure. But, on the other hand, while I know and think that great inconvenience arises from the absence of a judge from indisposition, I do not in the smallest degree on that account think that the circumstance, that a court can go on without a judge during the absence of one, proves that any reduction of judges could be made, or affects my opinion in the smallest degree. On the contrary, the inconveniences tend to support my opinion that any reduction of the number would be prejudicial. It is possible that some of the cases may have been delayed, which the judges were unwilling to hear during the absence of

of the Lord Justice Clerk. I recollect one cause, which is now in hearing at the present moment in the House of Lords, in which Lord Glenlee did not think, as a member of the Royal Bank, he ought to take any part, and it was delayed. Those are circumstances inseparable from human nature, namely, that you are exposed to the necessary absence of judges at times, from indisposition. But the fact, that the courts go on and discharge their duty in the absence of judges, does not affect the opinion that I previously stated, that the number of four is the lowest number at which the business can be done by either of the divisions. The experience we have had, not only then, but in the summer session, when Lord Glenlee was absent, and still more of late, when the vacancy has not been filled up, satisfies me that it would be most injurious to the interests of the country to reduce the number of judges in the inner division below that of four.

1647. In looking over the evidence given by you on the last day, I find it very difficult to arrive at a distinct view of what your opinion was upon several points, and therefore I have framed questions which I shall be very desirous of getting, as nearly as possible, a direct reply to. You consider the proceeding in general before the lords ordinary, as at present conducted, as being of a nature to admit of little, if any, improvement?—I thought my opinion had been very explicit on all the points put to me. I stated that very great satisfaction had been experienced always with the manner in which the lords ordinary had discharged their business, and with the manner in which the cases are heard before the lords ordinary; but if the question refers to improvements in the preparation of the causes before the lords ordinary, that is, in simplifying and shortening the revisals of records, I am not aware that I expressed the opinion implied in the question; on the contrary, I suggested that there might be improvements; probably the question embraces more than may be intended to be included in it; if it relates to the manner in which the cases are judicially heard and disposed of by the lords ordinary, nothing can be more satisfactory than the manner in which they do their business.

1648. Your opinion is similar as regards the proceedings before the inner chamber?—Yes, undoubtedly; I stated that most distinctly; I have not the least doubt that in progress of time the pleadings of counsel may get to greater lengths in the inner house; whether that will be an advantage or not is extremely problematical; but considering the change which has taken place since 1833, I am satisfied with the manner in which causes are heard and disposed of in the inner house; I am not aware of any cause that was imperfectly heard, or in which there was any indisposition to hear counsel, so as to bear upon the interests of suitors, or to shorten pleadings that for the interests of justice ought to have been longer.

1649. In short, you do not at present see any alteration necessary with a view to improvement in the proceedings of the inner house?—Understanding that question to relate to the manner in which causes are heard, I should say, none that can be said to be the subject of remark by any body.

1650. With regard to the state of business both in the outer and inner house, I understand you to say that you do not consider the extension of the session would be beneficial?—I think I stated that opinion distinctly, if I did not, I meant to convey that as my decided opinion.

1651. Or, that any advantage would arise from prolonging the daily sittings?—In all probability the daily sittings will be extended with an increase of business; I was not asked to state all the causes that have operated of late years to produce considerable decrease of business in the court; I have not the least doubt that there will be again an increase of business, and that will of course lead to an increase of time for despatching that business. Very often, during the last winter, the first division has been sitting from 11 o'clock till near 4; it was stated that the average sitting was two hours a day; whether that was the average of the two divisions I do not know; the fact was new to me, and surprized me, because I never thought of having the averages taken; but, according to the number of cases and length of pleadings, the sittings will vary, and I have not the least doubt that the increase of business will, in a short time, restore it to what it was a few years ago.

1652. Sir *W. Rae*.] Have you stated all the reasons of the decrease of business?—I have not the least doubt that from so many questions upon points of form having arisen, owing to the change in the system of pleading, a prejudice has been created against the court, which will soon be removed, and on that account I hope that the Court of Session will for some time enjoy a period of repose from further legislative interference, the operation of which I think has been extremely prejudicial to the interests of justice. And I likewise think that the great number

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of observations and remarks made in public quarters, upon the manner in which business is done in the Court of Session, have tended to create a degree of dissatisfaction which all such remarks will infallibly create, whether they are well or ill founded; I should hope that those will not always continue; at all events I think the effect of them will very soon die away.

1653. Do any other reasons occur to you?—I likewise beg leave to say that I think the decrease of business is to be accounted for by the strong desire of suitors to withdraw their causes from the Court of Session, and carry them to the sheriff's court, in order to avoid jury trial in civil causes; I have a strong hope that in time that prejudice, which is a general and great one, against jury trial will be removed.

1654. Dr. Stock.] In point of fact, the number of cases tried before the sheriff have increased of late years?—I think that extremely likely; at the same time I never looked into the returns; but I only know, that I am frequently consulted in regard to very important causes, which, I am told afterwards, to avoid jury trial, they take to the sheriff court, in order to have the proof taken by deposition; and then if the party is involved in litigation, and loses his case, it does not follow that there are appeals in all instances to the Court of Session; he may be advised that the judgment of the sheriff is right; in that case he may not throw away more money by application to the Court of Session; but I think the jurisdiction of the sheriff courts has greatly outgrown the principle upon which they were instituted. The fear of jury trial has led to an extent of civil jurisdiction being exercised by those inferior courts, which I do not think is for the advantage of jurisprudence in Scotland, and which is attended with this result, that the country has been saddled with an additional number of sheriffs substitute, in order to enable them to do the criminal business, which is an indispensable part of the sheriff's duty. The necessity for many of the recent additions of sheriffs substitute has been created by the civil jurisdiction of sheriff courts having been carried greatly beyond what was ever contemplated at the time Lord Hardwicke introduced that very useful and valuable part of the mode of administering justice in Scotland.

1655. Do not you consider the bringing home justice, to use the ordinary expression, by having courts in the immediate locality, may be advantageous to the public?—To a great degree. Nobody values more the institution of the sheriff courts than I do; but it does not follow that it is a valuable feature in the jurisprudence of the country to have a number of local courts, whose jurisdiction in civil causes is perfectly unlimited as to the great mass of civil causes, so far as they do not regard landed rights, and in which jury trial does not take place; and according to a very decided opinion which I, and I believe most others, entertain, could not advantageously take place. If the honourable Member putting the question wishes more information as to my opinions upon that point, they are stated at great length in my examination before the Law Commission in 1833.

1656. What is the system of inquiring into the facts before the sheriff; is it by *viva voce* examination of witnesses?—The examination of witnesses is all reduced into writing; in the smaller counties, where the sheriffs substitute can overtake the business, it may occasionally be taken by them, but in general it is taken by commissioners.

1657. If there be a sufficiency of time, the mode is, to take the evidence of the witnesses in the presence of the judge?—I believe there are some sheriffs substitute who do it, but it is done rarely, and I do not think that an advantage;—because as there may be an appeal to the sheriff depute and an appeal to the Court of Session, I do not think it is expedient for the first judge, who decides the case, to take the evidence in writing, for if he should believe the witnesses, and act upon their testimony, as the other party has an unquestionable legal right to appeal to the sheriff depute and the Supreme Court, it destroys half the benefit of the appeal; and, on that principle, in consistorial questions, I believe Dr. Lushington was of opinion that it would not do for the judge to take the evidence of the witnesses himself where there was an appeal from the decision of the judge.

1658. Mr. Wallace.] Is the Committee to understand that the people of Scotland generally prefer the sheriff courts to the Court of Session for settling their causes?—No, I do not think that is the result that follows from my statement, but that in reference to the class of cases which would come before juries, there being a considerable prejudice against jury trial, many parties institute the cause in the sheriff court to avoid any decision by a jury; and they have the evidence taken by commission which they cannot get in the Court of Session; for, by the statute,



statute, the court must send the case (if coming within the enumerated cases) to a jury, and are prohibited from taking the evidence by commissioners; and with regard to other causes, there are very few in which the court would be induced to grant a commission; they might and do refuse to do it upon the application of both parties. So far as confidence in the determination of the two courts goes, I apprehend no such feeling exists; the number of appeals from the sheriff courts to the Court of Session sufficiently indicates that.

1659. If I understand your evidence, it goes to this, that the alleged dissatisfaction of the public with the Court of Session is either unfounded or very greatly exaggerated; is that the import of your evidence?—To what extent any statement may have been made, or any statement may be referred to, as to the existence of dissatisfaction, I am not aware; I cannot tell to what the honourable Member may refer: I wish distinctly to state that I am not aware of any dissatisfaction to the extent to call for any public remark or inquiry; I do not think there is any ground for any complaint at all.

1660. The evidence which I allude to is this, that the professional objections, and those made by suitors, are attributable chiefly to excitement arising out of disappointment when decisions are given adverse to them; is that so?—Very often; in 99 cases out of 100 it is so.

1661. There is no general dissatisfaction, as far as you know?—I am not aware of any that may not be predicated of the mode of carrying on business in every court; there is always a certain class of the community who will make complaints against courts of justice, and find out some things in which they think a change might be made. There may be members of my own profession who differ from me as to whether the manner in which cases are heard in the inner house is wise and beneficial; one gentleman thinks that the judges should not read the cases before him at all; and so far as those matters go, there may be difference of opinion.

1662. But am I right in assuming, that the opinion you expressed throughout your evidence is, that the Court of Session, in its present form and in its present practice, is perfectly competent to determine all questions in a satisfactory manner to the public, and that it is not susceptible of any material improvement?—I am certainly of opinion, not only that the court is perfectly competent, in the terms of the question, to discharge all the business in a manner satisfactory to the public, but that they do discharge that duty in a manner satisfactory to the public, as much so as could be predicated of any court at any time, or of most courts in Europe. I do not by any means wish it to be understood, that any system of jurisprudence in almost any country may not be susceptible of considerable improvement. I think that there is nothing at present existing in regard to the Court of Session with which it would be desirable to interfere or meddle by legislative enactment; on the contrary, after the manner in which changes have been made from 1825 downwards, what we want is to be allowed to go on to work out quietly the practice of the court in remedying any trifling grounds of complaint or dissatisfaction which may exist.

Mr. John Riddle Stodart called in; and Examined.

1663. *Chairman.*] WHAT is your profession?—I am a writer to the signet.

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1664. How long have you practised as a writer to the signet?—Twenty-four years.

1665. Are you intimately acquainted with the mode of conducting business before the Supreme Courts?—Yes, I am.

1666. Mr. Wallace.] Does your experience enable you to state to the Committee whether the business of the Court of Session has decreased of late years?—Yes, it has, very considerably.

1667. To what extent has it decreased?—About a third.

1668. Is it a decrease in the number of cases?—No, not only in the number of cases, but I should say in the number of litigated causes in particular; there has been a decided increase in the number of decrees in absence, though there has been a decrease in the total number of causes brought into court; decrees in absence, the Committee is aware, are a mere matter of routine.

1669. Can you state to the Committee briefly to what extent this decrease has taken place?—I have made a memorandum from returns; in 1831 the total number of causes brought into court was 1,956, and the number of decrees in absence that year were 478; in 1839 the total number of causes was only 1,558, and the decrees in absence had increased to 563, leaving the litigated causes in 1831, 1,478, and in 1839 only 995.



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1670. Can you assign any cause or causes for the decrease of business before the courts?—I should say, generally speaking, that the great number of points of law that have been settled from year to year, will lead to a diminution of business; agents, when they are applied to in regard to a case, the first thing they refer to is to see whether the point has been settled; if they find it has been settled, they advise their client to that effect, and he does not bring the case into court; if you cannot find a precedent, you take the opinion of a counsel whether it is likely to be a good cause, or you may bring the action at once; but if you find the point settled, the proceeding drops; and numbers of points being settled from year to year, leads to the conclusion that in the progress of the country there will be a diminution of business compared with its extent; in the infancy of a country I should suppose that there is more litigation in proportion to the wealth and civilization than in a civilized country; that is one cause.

1671. Are there any other causes?—There are other causes.

1672. State any other causes which occur to you; have a considerable number of questions upon feudal law been settled?—Branches of business have been removed altogether from the court, and put an end to; particularly, I might instance, the very important feudal questions that arose in reference to election petitions; they were disposed of by the inner chamber; they were put an end to by the Reform Act; some of the most difficult and important questions we had arose from election petitions; I know of no such cases now; that is one branch. Other branches of business have been removed by recent improvements; *cessiones bonorum* are now almost entirely conducted before the sheriff's court; those used to occupy a great part of the Saturday each week, and sometimes the whole of Saturday; now comparatively few such actions are brought; the sheriffs take them nearly all. I think likewise that there is a considerable dissatisfaction in general, from the diversity of judgments pronounced by the two different divisions, which leads people not to come before the court, but to try to settle the matter in some other form, or before some other tribunal, or by arbitration. Those appear to me to be the leading causes of the falling off of business.

1673. Do you mean the Committee to understand that the dissatisfaction of suitors, arising from distrust in the judgment of the court, has led extensively to arbitrations, of late years?—I should think it has; and to compromises, and various ways of settling causes out of court.

1674. Is the delay in having business carried through the Court of Session a cause of dissatisfaction?—It is.

1675. Is the expense attending the conducting of causes through the Court of Session one cause of the dissatisfaction you allude to?—Yes.

1676. *Chairman.*] Is not the expense of a law-suit one universal cause of dissatisfaction, particularly to the party who loses?—Yes.

1677. *Dr. Stock.*] Do you mean the Committee to understand that those are causes of greater dissatisfaction now than formerly?—No, I do not state that; the question put was, whether the expense of the court was one cause; I do not say the expense has increased.

1678. *Mr. Wallace.*] What may be the difference of expense of settling similar questions before the sheriff and before the Court of Session?—It is rather difficult to say, because the Court of Session causes take such different shapes; but I should suppose, in a rough way, the expense of settling a cause in the Court of Session was from double to triple what it is in the sheriff's court.

1679. The main object of this Committee's inquiry is, whether or not the present number of judges in the Court of Session can be diminished; and I wish to inquire whether you think the present number of judges in the Court of Session necessary for the business of the country?—No, I do not.

1680. Have you formed any decided opinion as to how many judges would be necessary to perform the duty?—Yes, I have a pretty decided opinion that one division would be better than two, and that division should consist of four judges, with five lords ordinary in the outer house; I should think they would get through the work better than at present; that is, one division should be struck off.

1681. Would you leave the lords ordinary as at present?—Yes, the same number.

1682. You consider that one inner chamber, consisting of four judges, would be the best for conducting the business of the country?—Yes, I think it would.

1683. If you have formed any opinion as to the number of four being preferable to three, or any other number, will you state to the Committee what your reasons

reasons are for that opinion?—I think four is a preferable number to three, or five, or seven, because, in cases of equality, which have frequently arisen in our courts, I think the opinion of the lord ordinary, who has previously decided the cause, should be counted, and then you will always have a majority of one judge; at present, in cases of equality, the practice is to take the opinion of the other chamber, and you might still have an equality of votes or opinions; but if you count the opinion of the lord ordinary, which I beg to suggest as a very important remedy, you would always have the decision of three to two—that is the least you could have—and you would get the decision without waiting the interminable time that you at present wait for an opinion from the other division.

1684. You have stated your view in favour of four; will you state what the present practice is in case of equality?—The present practice is to take the opinion of the other division of the court; and it may happen that two of the consulted judges will give an opinion on one side and two on the other, and after waiting a long time, you are just where you were; you do not extricate the difficulty.

1685. Does this mode of proceeding, of calling in the other chamber, create considerable delay?—It creates very great delay.

1686. To what extent does that sometimes go?—It extends to 14 months sometimes before you get the opinion; in the last case I had, it extended to 14 months.

1687. *Dr. Stock.*] Do you mean by calling in the opinion of the second division that they sit in common?—Not always; the more usual way is to send the papers to the other division for their opinion; they return written opinions; those are laid before the chamber, which consults them, and the decision is made conformable to the opinion of a majority of the whole of the judges.

1688. Do you mean that it sometimes happens that they are 14 months in forming this opinion?—Yes.

1689. *Mr. Wallace.*] Have you known it more than 14 months?—Not in my own practice, but I believe it is sometimes longer.

1690. Can you state the average period?—I should think about 6 months.

1691. Is the result of this mode, of one chamber consulting the other, considered satisfactory by the profession?—No; in many cases very far from it; and where the consulted judges differ in opinion, you only get a greater diversity of opinion upon the case; and as it only happens that the one chamber does consult the other in difficult cases, or where they differ themselves, you very generally find that the consulted judges differ also.

1692. You have stated, that there are two ways of taking the opinion of the two chambers, but you only describe one of those ways?—The other way is, for the whole of the judges, including the lords ordinary, to sit as one chamber, and have a hearing in presence, that is, to hear counsel on the cause.

1693. Is that a convenient way of obtaining a decision?—I should say it was as convenient as the other in some respects, but it has one very great inconvenience, that it withdraws all the lords ordinary from their usual business in the outer house, and the business is at a stand; I consider that a great evil; it retards the business of the court considerably.

1694. *Dr. Stock.*] Are those joint meetings of the judges frequent?—No, not very frequent; the other mode I mentioned is more frequent.

1695. *The Lord Advocate.*] Does that interruption of the lords ordinary arise from the court sitting too early in the day?—It would be more convenient if the lords ordinary were allowed to exhaust part of their daily sittings before they were called in; I should say if the lords ordinary were allowed to sit till one o'clock, and were then called in, and the hearing continued from one to four, that that would remove to a considerable degree the inconvenience of that mode of taking the opinion of the whole court.

1696. If they sat till four or five, or whenever the argument ended?—Yes.

1697. Do you know any particular reason why the court should rise always at four o'clock?—No.

1698. In point of fact they very seldom sit till near four?—Very seldom.

1699. *Dr. Stock.*] How often may it arise that the business of the lords ordinary is interrupted by sittings in presence; does it happen very frequently?—Not very frequently.

1700. Not once a week?—No, not once a month; there was a good instance of interruption which occurred two years ago, in the Auchterarder case, one of the church causes; it was brought up to the House of Lords; I am hardly prepared to state the number of days it occupied, but it occupied a number of days.

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1701. Dr. *Lushington*.] Were not the judges eight days in giving their opinions in that cause?—They were a great many days, but I have no note of the time occupied. I remember feeling, with my brethren, the great inconvenience we were exposed to in waiting from day to day for the lords ordinary, who did not come out to despatch their business.

1702. The *Lord Advocate*.] There is a complaint that the ordinary business of the court is stopped too, because they take no other business of importance?—Yes, it not only stops the business of the outer house, but of the inner house.

1703. That, of course, would be remedied, and the ordinary business of the court might go on, if the court on those occasions sat longer than on others?—Yes, if they sat much longer in the day; I would venture to suggest as my opinion, that the best remedy would be not to take up those causes till an advanced hour in the day.

1704. Dr. *Stock*.] Do you recollect hearing of a celebrated instance lately in which the 15 English judges sat upon one individual term for several days?—No.

1705. Mr. *Wallace*.] Would you consider it an advantage if the inner chamber had no other chamber to consult?—Yes, I should.

1706. Will you state your reasons?—I think, in difficult cases, if the inner chamber had no other chamber to consult, the judges would mature their own opinions with greater deliberation, feeling that there was much greater responsibility thrown upon them; I would further state that the getting quit of the great delay which I have already mentioned, which arises from consulting the other division, would be a great advantage to suitors.

1707. From what you have stated, is the Committee to understand that you think one inner chamber could overtake all the business of the two chambers?—Certainly.

1708. In that case would you anticipate that the daily sittings should be longer than at present?—If the business were conducted in the same way as at present, the one chamber would require to sit, of course, double the time that the two sit, that is, it would require the same number of hours that the two together sit. If the second division sit two hours, and the other two hours, one chamber would require to sit four hours, or nearly so, to conduct the business in the same manner; there would be some gain of time in getting counsel more readily to the bar; there is some loss of time in running from one division to the other, and waiting for counsel, which would be obviated by having only one chamber. Suppose the present divisions sit four hours, I should say three hours and a half would get rid of the same amount of business, if conducted in the same manner; and I understand, from my own observation, and seeing returns, that the two divisions sit two hours a day at present, or about that.

1709. Is the Committee to understand that you consider one chamber sitting four hours a day would be sufficient to perform the duties at present performed by both chambers?—Yes.

1710. Are causes frequently delayed in one division of the inner chamber owing to counsel being engaged in the other?—Yes, frequently.

1711. Has it appeared to you that there is any part of the business of the inner chamber that the judges might be relieved from?—Yes, there is a very considerable portion of it that they might be relieved from.

1712. Will you state to the Committee what proportion of the duties are now performed by the judges in the inner chamber of which they could be relieved?—In my opinion they could be relieved of the whole routine business which occupies one-third, at least, of the time of the court.

1713. Will you describe what you mean by the word "routine business"?—I should call routine business the whole of what we call the single-bill roll, that is, the roll of causes which is put out daily, and which commences the business of each day; it contains reclaiming notes, which are the form of bringing the causes under review, and ordering them to another roll; the Lord President of each division runs over such papers, the back of them, and the words he pronounces usually are, "to the roll," a mere order of form, but that occupies a portion of each day; and there are a great variety of procedure before the inner houses which I think they had much better be relieved of, such as summary applications for fixing or altering the upset price of land, in sales, and applications for registration of entails, and all that sort of business, which it would be tedious to detail; but there are thousands of such things, which are mere matter of form, and the order is pronounced as a matter of course.

1714. By

1714. By whom is this routine business performed?—By the head of each court. Mr. J. R. Stodart.

1715. How are the other three judges occupied during this proceeding by the head of the court?—They sit there, but they take no part; the proceeds all have to be signed in the presence of the court, and therefore they sit there.

1716. And look on whilst the President goes through the duty?—Precisely so: they take no part.

1717. *Chairman.*] Does this proceeding occupy much time?—I have already stated, that, in my opinion, it occupies about a third of the whole time of the court, sometimes more.

1718. *Mr. Wallace.*] Has any plan suggested itself to you for having this duty otherwise performed?—Yes, I think it might be performed quite as well by the clerks.

1719. Is there any other way?—A great part of it, in my opinion, never should be in the inner house at all; a great deal of that routine business arises out of causes which are brought into the inner chambers, which I think should commence before the lord ordinary, and be prepared before the lord ordinary. The first order in such cases is, "Remit to the lord ordinary to prepare the cause," or some such order. The time occupied in making that remit might well be spared by the court making a general rule, that all such causes should be brought in the first instance before the lord ordinary, and that the time of the court should not be occupied in making the remit to him. If a general rule were made, that every cause should be taken before the lord ordinary to prepare, that might be got rid of.

1720. *Mr. Serjeant Jackson.*] Is there any fee paid to counsel?—There is a fee paid to counsel, and a fee paid to the attorney, and a fee paid to the clerks of the court, the whole of which is useless, and worse than useless.

1721. *Mr. Wallace.*] Is the Committee to understand that the time of the court is not only uselessly occupied, but that it is so occupied that the suitors before the court have fees to pay, both to counsel and their agents, and the clerks of the court, for these proceedings which are unnecessary?—Yes, unnecessary before the inner house. I stated that the routine business should be done, in my opinion, in the outer house, or by the clerk of the court; a great part might be taken by the clerk of the court, or by laying down a general rule, such as I spoke of.

1722. Supposing the inner chamber were relieved of this routine business, could they overtake a greater amount of important matters than at present?—Certainly, the time occupied in routine would be saved to them, and they would have more of their time left for more important business.

1723. Have you formed any opinion to what extent that saving of time might go?—I think it would go to the extent of one-third of the present sittings of the court, assuming those sittings to be two hours a day. I think it is better than a third.

1724. *The Lord Advocate.*] Somewhat better than half an hour?—Yes, some days more than an hour.

1725. That is when questions arise causing some discussion at the bar?—Sometimes not, but simply from the very long single bill roll; from a variety of those matters coming together on a Saturday, it frequently occupies an hour.

1726. *Mr. Wallace.*] Without discussion at the bar?—Yes; if there is discussion it takes more than an hour, but I take the average, and say it occupies half an hour.

1727. Do you know any reason why the court should not sit five or six hours a day, in place of two hours?—No.

1728. Supposing it was the understanding that the rule of the court should become imperative or general that the judges should sit six hours a day, and were relieved of the routine business which you have now detailed, what amount of business do you think they could perform; the question is applicable to the two chambers?—If they were relieved of the detail, I should say they would be relieved of three quarters of an hour daily, which they might devote to other business; and if they sat six hours, instead of two, they would have four hours and three quarters additional time to do the proper business of the court, which would necessarily enable them to do more than three times the extent of business; that would be five hours and three quarters to do important business, instead of one hour and a quarter.

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1729. Sir W. Rae.] You suppose the whole business to be done in court?—Yes, the question applied to business done in court.

1730. Mr. Wallace.] But you are aware that much of the time of the judges is occupied in reading papers, or ought to be so; do you keep that in view?—Yes; I am aware of the reading of papers, and somewhat of the extent of it; I should say they would have ample time to read all that was necessary if they were in court five or six hours a day; I think at present they read at the wrong time; I cannot say how much they read, but supposing they read all that is laid before them, I think they read it at the wrong time.

1731. How so?—The practice I understand to be, to read the record before coming into court; now I think the proper time to read the record should be after hearing the cause fully debated; and then, if it seemed to involve any difficulty, they would go home and read the record, or consider it in the afternoon; if it was a matter that was quite clear and did not seem to involve any difficulty, if the judges all agreed in opinion, which, I believe, is the case in by far the greater majority of causes, then they would not require to read any thing; there is no use in their reading any thing if the cause is clear, but the present practice is to read the records in all these causes, which is useless; the reading of all these records might be saved.

1732. Are the observations that you make applicable to the inner chamber, or both inner and outer?—They are applicable to both; the practice of the lord ordinary, I understand, is to read the record too; I gather as much from the remarks made from the Bench.

1733. Have you formed any opinion as to whether the extent of papers now necessary to be read has decreased of late years?—Yes, it has very much decreased.

1734. Have you any opinion as to what extent the decrease has taken place?—I examined the printed papers for three years, 1823, 1824 and 1825, and 1836, 1837 and 1838; I took the years 1823, 1824 and 1825, as being the years immediately preceding the passing of the Judicature Act, when the new forms came into operation, that I might see what quantity existed immediately preceding the Judicature Act, and what quantity existed in the last three years that I can get at present. The proportions were as 78 for the three former years, to 45 for the three latter years, which is a decrease of more than one-third. I may explain further that in point of fact it amounts to fully one-half, because there was in the latter years a considerable proportion of printed papers which was a mere repetition; whereas, under the old system, it was all reading; each paper was distinct from the other; at present the record contains a statement of the facts, and a note of the pleas of law; then in a great variety of causes there are written pleadings ordered that are printed; those written pleadings contain on each side all the material facts; of course each party embodies the material facts in his pleading, and I should think it was unnecessary to read both the pleading in which the party has introduced a complete detail of the material facts, and the record which is merely a skeleton of the facts.

1735. Has it occurred to you, that even the present amount of reading might be further lessened, advantageously to the business of the court?—I think the lords ordinary order cases too frequently, which of course throws more reading upon the inner-house judges than they would have if the lords ordinary did not order so many cases.

1736. Is the practice of ordering cases, in your opinion, upon the increase?—I do not think it is on the decrease; I do not know whether it is on the increase; I think it has increased since the Judicature Act came first into force; I think the judges were first impressed more with the idea that the new forms were to supersede the written pleadings.

1737. Is it more the practice of some lords ordinary than others to order those cases?—Yes.

1738. And it is entirely discretionary with lords ordinary whether they shall order them or not?—Quite so.

1739. Dr. Stock.] Does the cost of preparing those cases fall upon the losing party?—Yes; they are taxed against the losing party.

1740. The Lord Advocate.] The cost of preparing those cases forms part of the cost of the suit?—Yes.

1741. Sir W. Rae.] It does not always follow that costs are awarded against the losing party?—No; but where the costs are awarded against a party, I never knew

knew the costs of preparing cases not to form a part of those costs ; this ordering of cases is the cause of a great deal of expense. Mr. J. R. Stodart.

1742. Mr. Wallace.] Looking to the mode in which causes are at present heard in the Court of Session, do you think the present practice of pronouncing judgment immediately after hearing counsel is advantageous or otherwise?—I think it is very disadvantageous ; in all important causes, I think if the judges were to defer judgment till the following or till a future day, and consult among themselves, they would come to greater unanimity than at present prevails, and that appeals would thereby be lessened ; I may, perhaps, add, that I happened this morning to be turning over a speech of the present Lord President, made at the time when the Judicature Act came into force, and I see in that printed speech this same opinion expressed ; the opinion which I have formed was formed without my knowing that such an opinion had been expressed, but I was this morning turning over accidentally that speech, and I found that that opinion is strongly expressed in that speech, which the Lord President made to the court at the commencement of the Judicature Act.

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1743. The Lord Advocate.] Has that recommendation of the Lord President been fully followed?—By no means.

1744. Mr. Wallace.] What was the recommendation?—That the judges should be extremely cautious in forming their opinion, as that opinion was to be final ; before that Act came into force you might have reclaiming petitions against judgments until you got two consecutive judgments ; under the Judicature Act, when the court pronounce a judgment it is a final judgment ; and the advice of the Lord President was, that the judges should be extremely cautious in forming their opinion, as the opinion was to be final ; and that with a view to that, they should defer judgment till a future day ; that recommendation has not been acted upon to a great extent ; I think it would be a great improvement if it were acted upon to a great extent ; in every case, I should say where the judges were not unanimous, it would be an advantage if they deferred judgment, and had a consultation together ; it would satisfy parties that due consideration was given to their causes.

1745. Sir W. Rae.] How could it be known whether they were unanimous or not?—It could be easily ascertained by the President aside consulting his brethren, whether they were for the one party or the other ; it is done every day now ; in cases where there does not seem to be a difference of opinion, the Lord President, aside to his brethren, asks what their opinion is.

1746. Mr. Wallace.] Will you refer the Committee to the advice given by the Lord President?—I have not it with me, but I could get it, and produce it, but I have stated the import of it.

1747. The Lord Advocate.] Was the speech put into the books of sederunt?—I think it was ; I believe the court requested that it might be put into the books of sederunt, and it will be found there.

1748. Mr. Wallace.] By way of showing the desire of the President, and the understanding of the court that it should be adhered to?—Yes.

1749. Is it your opinion, that the inner chamber or chambers should be entirely courts of review?—As much as possible ; there may be some causes which should come before them in the first instance, after being prepared ; I have already said, that I think all causes should be brought before the lords ordinary to be prepared, or before the outer-house judge, to get quit of routine, and, with few exceptions, I should say, the inner house should be a court of review in all cases.

1750. Would that be agreeable to the general view of your professional brethren, as well as yourself?—I should think it would, as far as I have heard the opinions of the profession ; I think the profession generally approve of separating the routine business as much as possible.

1751. You have adverted to business which you have proposed should be moved from the inner to the outer house ; will you give an outline to what you allude?—I have mentioned generally the whole routine business ; to illustrate the matter, I might take a decree in absence ; the present form is this ; if a cause comes before the lord ordinary in the outer house, and there is no defence put in, a decree in absence is pronounced against the defender ; the form of getting that opened up, or the party being reponed against, it is to put in an application to the inner house in the form of a printed note, called a reclaiming note, which appears in one of the rolls of the court ; counsel moves that, or is presumed to move it ; he is feed for signing it ; the President runs over the roll, and the order

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upon this paper is, "Remit to the lord ordinary to reponer, upon payment of such costs as he shall see fit;" that is the universal order; it goes back upon that remit to the lord ordinary; you are then required to enrol before the lord ordinary, occupying his time by making a motion, to be reponed upon the terms of this remit, on payment of such costs as he shall see fit; the usual practice is for the lord ordinary to reponer the party on the payment of two guineas.

1752. Dr. Stock.] Is there any limitation in the time within which the party can make that application?—Yes, 21 days, but still that form is gone through in all cases; now, it humbly appears to me, that in that procedure there is a great deal of time spent unnecessarily by the judges of the outer house and the inner house; there is a motion before each; there is no result at the end, but this, that the party is reponed upon the payment of two guineas; it would appear to me, to simplify the matter, if the judges laid down a general rule, that the party should be reponed on lodging his defence with the clerk within 21 days and paying two guineas, or producing evidence that he had done so, to the opposite party.

1753. Dr. Lushington.] How much time would that save?—One minute in the inner house and a minute in the outer house, which if you have a hundred such things, would save the time of the court considerably.

1754. The Lord Advocate.] You stated that you considered the routine business would occupy half an hour of the court daily?—Yes; I was asked to give a specimen of the kind, and this is the example I give.

1755. Dr. Stock.] Do you conceive that that change in the practice might be made by act of sederunt?—I am afraid not; I am afraid this particular form is laid down in the Judicature Act, and if it is, it could not be altered by act of sederunt; I am not certain, but I speak pretty confidently that it is.

1756. Mr. Wallace.] You have stated a strong opinion in favour of one chamber only; what do you consider the chief advantages of having but one inner chamber in place of two?—The first advantage would be that you would then have no diversity of opinion; I consider it a great disadvantage to have two chambers sitting in the same court, as I may say, giving different opinions, either on points of form or points of law; that diversity of opinion naturally leads to increased appeals; you might to a certain extent lessen appeals by having only one chamber; another advantage I should say is, that the facility with which you would get senior counsel to the bar would be considerably increased; much of the delay and expense arises from getting senior counsel up to the bar in time; they are occupied in pleading in one division, or waiting there, and have to be sent for, and there is a loss of time; if they are pleading, you cannot go on with the cause at all; the court will delay the cause for a different day, or a different hour of the day, till they can be got, and in that way loss of time arises.

1757. Would there be a saving of time in this?—Yes; the profession to which I belong, and others practising as agents, frequently fee two, even three senior counsel, in order to secure the attendance of one when the cause comes to be advised. The court, though they extend their courtesy, and do not go on with the advising of the cause at first in the absence of the senior counsel, if he is in the other division, yet, if that is repeated, I have known the court to insist upon proceeding with the advising of the cause; they call upon the junior to state what he has to say, and you do not get the benefit of a senior, whom you have feed, at all; that would be done away with if you had but one chamber; it is an evil of considerable magnitude. I may add, as another advantage, that you would get quit of the great delay which I formerly alluded to, by consulting another division sometimes, without at all improving the character of the judgment in the opinion of the profession, because you find that ultimately it is carried by a majority of one in a cause where the judges differ in opinion.

1758. In the event of equality in the opinions of the judges, what do you consider the best way of extricating the case?—The best way of extricating the case, in my opinion, is always to count the opinion of the lord ordinary as one; I think the opinion of the lord ordinary is just equal to the opinion of an inner-house judge; and if you have an equality in the inner-house, if you count the opinion of the lord ordinary, you have always three to two, suppose the court consist of four, and you do not require to wait to extricate it further. One great disadvantage which would arise from having a chamber of five (or seven) would be this, that having got the judgment of the lord ordinary, when you go into the inner-house to have their judgment, the whole of the court differ; you have three judges decid-

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ing the cause in one way and you have two of a different opinion coinciding with the lord ordinary; that, in fact, is three judges on each side, while the result is that the party who has the good fortune to have the opinion of the three inner-house judges in his favour gains his cause, while the other party has lost his cause.

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1759. Sir *W. Rae*.] Do you consider that a judge makes up his mind, that he is not open to conviction by argument, when the case comes to be fully discussed again?—I do; he is not open to conviction to alter a decided opinion, otherwise why should we see the judges differing in opinion after the case is fully heard?

1760. You think when the lord ordinary has given his judgment, if he came into court to hear that case again discussed, it is quite impossible that his opinion should be over-ruled by the other argument?—It is not impossible.

1761. But you count in the lord ordinary as one of the judges in deciding the cause?—I presume the lord ordinary to have given his judgment on full consideration, and after hearing counsel fully; that opinion I conceive to be as good as the opinion of an individual judge in the inner chamber, and therefore I do not see any good reason why it should not be counted in the extrication of a cause when the judges of an inner chamber come to be equally divided.

1762. Would it not be a better mode to bring him to hear the cause in the court?—I should think it would be as well; I see no objection to that whatever; but my opinion is, that the lord ordinary, in cases of equality, should form one, to extricate the difficulty; that that would be the best way of extricating the dilemma; whether he should hear the case again, I think not of great importance, for the lord ordinary, having matured his judgment, in 19 cases out of 20 I think would adhere to his opinion.

1763. Mr. *Wallace*.] Or in other words, unless there is a majority against the lord ordinary, that his judgment should be held to be good?—Exactly; that is the result; by that mode of procedure you would get quit of a great deal of delay which arises at present from judges in the inner house being equally divided.

1764. Dr. *Lushington*.] Does that often occur?—It occurs very frequently; taking the opinion of the other judges is on the increase, I think.

1765. It does not necessarily follow, that there must be an equal division of judges in order to take the opinion of the consulted judges; do not they take it in questions of doubt?—Yes; where they have not made up a matured opinion of their own, but conceive it to be a difficult case, they occasionally take the opinion of the other chamber, without formally differing two and two.

1766. Mr. *Wallace*.] You have stated your opinion with reference to the alteration, by the reduction of one of the chambers at present existing; with reference to the outer house, have you formed any opinion how many lords ordinary you consider necessary to perform the business in that court?—I think five lords ordinary would be ample for the present business of the court.

1767. To what time would you extend the daily sittings, to get through the business they now perform, and prevent arrears?—Sitting four to five hours a day steadily five days in a week, I should think, would prevent all arrears, provided the business were nearly equally distributed among the lords ordinary.

1768. In the opinion you have now given, do you take into account the delays which take place before the lords ordinary, from various causes?—Yes, I take the business as at present conducted.

1769. Will you state to the Committee what are the chief causes of delay before the lords ordinary?—The first cause of delay, I think, is the want of senior counsel at debate; the cause is partly debated, the senior counsel called away to the inner house; the inner house have precedence of the outer house, and they leave immediately when they are called for an inner-house cause; the debate is half heard; when the counsel return, there is another part heard, and it is broken into pieces, and is very unsatisfactory; then it often happens that a cause is called when the senior cannot be got at all; it is just continued over from day to day, till the senior counsel can be got; that frequently runs on for a considerable extent of time. After the debate is closed, the next step of delay rests with the judge in the *avisandum*, which is, taking the case home to consider, and the causes are frequently kept by the judges, before they pronounce judgment, before they return it, a long time—sometimes a month, or six weeks, or two months—I have known three months; then, after waiting two or three months, or it may be one month, there is an order comes out for

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cases, and the preparation of those cases, and revising them, occupies a very great extent of time. Then, I would say, another reason is, the great disproportion of causes brought before one lord ordinary, as compared with another, and loading his roll with causes which he cannot overtake. Those are, I think, the leading causes of delay at present in the outer house.

1770. Did you advert, in the reply you gave to the last question, to the time occupied by the motion-roll, or other routine business before the lords ordinary?—I have not adverted to that; that is another cause of retarding the debates of causes; a great deal of time is taken up with the motion-roll and routine business of the lords ordinary.

1771. Can you suggest any remedies for these sources of delay and inconvenience?—I think the greater part of the motion-roll might be disposed of by the clerk and agents, without the intervention of the counsel at all—it is mere matter of routine; where the parties did not agree, you might follow out the present practice of having counsel to make motions at the bar; but in the much greater proportion of cases I should say there would be no occasion for the interference of a judge or counsel. Another cause of delay is, the time occupied in preparing causes; it perhaps had better be left to one judge to take the whole of that duty; it would accelerate it, and leave the time of the lords ordinary for hearing debates. Another remedy is, to provide some means by which counsel can be brought together to debate the cause from end to end, instead of being called away, and the debate being continued at intervals; the remedy there, I should suppose, was to attach counsel to the inner house, so many as seniors.

1772. You have referred to the disproportionate number of causes which one lord ordinary has over another; is there anything you have to suggest on that point?—There are two remedies I think for that, either of which would cure the evil, one of them, if not entirely, at least to a considerable extent; if the average proportion of causes which were brought into court were calculated, which it easily could be, from week to week, and after a lord ordinary had got his fair proportion, the clerks were instructed not to enrol any more before that lord ordinary for that week; to illustrate this, I may state, suppose the number of causes brought into court were 100, and there were four lords ordinary taking up the roll as soon as one of them had got 25, being a fourth part; I should hold his roll as closed for that week, the suitor would then have his option of going to the other three; he would go to the next lord ordinary in whom he had confidence, and if he had not 25 causes, he would get his cause set down in his roll; if his roll was full, he would be driven to the third; and if he was full, to the fourth; if he did not choose to enrol, I would leave it optional with him to enrol next week, when he would have his chance of enrolling before his favourite lord ordinary; if he did not take that chance, he would enrol before the second or third; that mode does not force the suitor or agent to go before a judge whom he wished to avoid. The next remedy would be to equalize the causes completely by a regulation, that the whole causes should be enrolled and distributed amongst the lords ordinary by lot; that would be the fairest way; if there were 100 causes, divide them into four of 25 to each; I know among the profession there is a feeling against that; for myself, I do not think the injury would be so great; if good judges were always appointed, it would be a matter of indifference before whom the cause was brought.

1773. Dr. Stock.] But it might not appear to be so to the suitors?—No.

1774. Mr. Wallace.] What would the effect be of any rule of court to provide that causes should not be delayed because senior counsel were not in attendance?—It would lead to an increased despatch of business; you would have counsel, but you would have to content yourself with junior, if you could not get senior.

1775. Would not that be the necessary consequence of having counsel attached to the inner chamber?—Yes; you would not wait for counsel.

1776. Are you aware of any plan having ever been adopted for separating or classifying counsel?—Yes, I am aware of that; the difficulty of finding counsel by the outer house showed itself at an early period, and that the court interposed by act of sederunt, 11th of January 1604; the commencement of it is, "For removing of that impediment in proceeding in the outer house, that the procurator is there ben;" perhaps it may be necessary that I explain to the Committee the meaning of that; it means that the counsel was then in the inner house, exactly the evil that we are now talking of; "it is appointed by the said lords that there shall be 15 advocates nominated, who shall be appointed for the inner house; and whatever clients shall have occasion to employ any of them in any action to be decided

decided in the outer house, the same client is hereby willed and advised to provide himself of any other advocate not of the number foresaid; that in case at calling his matter, his principal advocate be in the inner house; that, nevertheless, the other may be ready to dispute the case before the ordinary in the outer house; and if any procurator is there ben, they shall procure no delay, but present process shall be granted."

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1777. Dr. *Lushington*.] Has that act of sederunt always been in force?—It is not in force at present; I do not know how long it remained in force; then followed the list of 15 advocates.

1778. *Chairman*.] Is it on the records of the court, that that act of sederunt took effect at all?—I can have no doubt that it took effect; it passed as it bears for removing an existing grievance.

1779. Dr. *Stock*.] Was it ever repealed?—No.

1780. Sir *W. Rae*.] Did you ever find any addition to the 15 subsequently made?—No, I never observed.

1781. Mr. *Wallace*.] Can you inform the Committee about how many leading counsel there are now at the Scotch bar?—I think there are only four or five what you call leading counsel.

1782. Do you understand the term perfectly, "leading counsel"?—Yes.

1783. Could you at all form an estimate as to how many there are of what may be termed well-employed counsel at the Scotch bar?—About twenty.

1784. How would it affect the business of the outer house if it were made a rule not to interrupt it owing to the absence of senior counsel?—It would produce great despatch of business exactly in the terms of this act of sederunt; they would procure no delay, but present process would be granted; that is what we want.

1785. Dr. *Lushington*.] Would it be so satisfactory to parties to have a cause disposed of in the outer house by counsel who were not leading?—I should think hardly.

1786. *Chairman*.] Do you suppose that if the judges were to propose to make an act of sederunt now, similar to that which you have quoted made in 1604, the Society of Writers to the Signet would submit to such an act of sederunt without petitioning against it?—I really cannot say of the body; I myself should think it was a very good arrangement.

1787. Would it be your opinion that the Society of Writers to the Signet would submit to such an arrangement without petitioning the court to consider well before they made it?—I can hardly answer the question; my own opinion being that upon the whole it would not be injurious to the conduct of the cause; I cannot say what other people might think; I am naturally inclined to think that they would think favourably of it.

1788. You are naturally inclined to think that it would be the opinion of the profession that such an arrangement would be desirable?—I think, myself, that if all the present leading counsel were confined to the inner house, the conduct of the cause would not suffer.

1789. Then I am to understand that you do not feel yourself justified, or able to state, what would be the opinion of the Society of Writers to the Signet upon such a point?—Not decidedly; I should rather think they would be favourable to it; I have heard so generally among the profession complaints of the manner in which debates are conducted, that suits are heard to a certain extent and then broken off, that I think the profession, if the rule were confined to the inner house, and were not made too extensive, would approve of it.

1790. Dr. *Stock*.] That Act of 1604 did not go to the extent of confining a portion of the counsel to the inner house, but removed an impediment if they should happen to be absent?—Yes, that is so.

1791. What, in your opinion, would be the feeling of the writers to the signet to such a rule?—I think they would not be against it.

1792. Mr. *Wallace*.] If you have formed any opinion, looking to the senior and junior counsel, what effect would such a classification of counsel have upon the bar?—I think it would not be unfavourable to the bar.

1793. *Chairman*.] When you say it would not be unfavourable to the bar, you mean that it would not be unfavourable to the growth and nurture of talent among the professing advocates at the bar?—Yes, precisely so; nor would it be unfavourable to the emoluments of the seniors. I do not know whether the question meant whether it would be unfavourable to the nurture, and growth and improvement of the bar, or whether the question related to other things.

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1794. Mr. Wallace.] Do you mean to state that a division of counsel would not be injurious to the general employment and emoluments of the bar?—Certainly.

1795. The Lord Advocate.] With the exception of those interruptions in the debate, which arise from the different occupation of the bar, your profession and you, generally, have all along been satisfied with the hearing given by the lords ordinary to the bar?—Yes.

1796. With the pains that have been bestowed by the judges, and the painful and laborious investigation the cases have undergone?—Yes.

1797. Is it your opinion that there would be an advantage in extending the *viva voce* pleading in the inner house?—Yes.

1798. Do you think at this moment that the mode of discussion at present is too short?—Yes; generally speaking, I should say the discussions are too short in important cases.

1799. What is the opinion, in general, of your profession; is there the same satisfaction of the discussions in the inner house as in the outer house?—No; not so great satisfaction.

1800. Are any cases as satisfactorily decided as those cases which are very fully heard, as some cases are in the inner house, upon *viva voce* discussion, in hearings in presence, in consequence of particular orders given in certain cases?—No, I should think not; the profession, I think, are always better satisfied when their cause is fully heard *viva voce*, than when it is disposed of in any other way; the impression among the profession is, that you can depend more fully upon the judges having been put in possession of the leading facts, and views and pleas in law; it produces a more favourable impression in the profession as to the result, and the maturity of the judgment.

1801. The hearing is always a fuller hearing than in the ordinary course?—Yes, much fuller.

1802. Is it the practice, that unless that order is pronounced the case shall not be gone into with the same minuteness and detail in the inner house as before the lord ordinary?—That is the present practice.

1803. Generally?—Generally; more particularly where there have been written pleadings, which supersede, in a great measure, the hearing of counsel.

1804. Dr. Lushington.] Is it usual for the inner house to take time to deliberate after they have heard the arguments of counsel?—No, it is rarely done.

1805. It happens rather frequently that the inner house differ among themselves as to the judgment they give?—Yes.

1806. That you hold to be one great source of appeals to the House of Lords?—Yes, that is one source of appeals.

1807. Chairman.] You have stated that *viva voce* proceedings are not adopted to the extent in the inner house that they are in the outer house; suppose the *viva voce* proceedings to be adopted in the inner house to the extent contemplated when the Judicature Act was passed, would there not be more work for the judges in court than there is at present?—Yes, there would.

1808. Taking that into consideration, is it your opinion that the inner house might be reduced to one division, with four judges in it?—Yes, decidedly; my reason for saying so rests upon this, that if causes were fully heard at the bar, which I understood, as a practitioner, was to be one object of the Judicature Act, there would be no occasion for written pleadings.

1809. Dr. Lushington.] You mean by written pleadings, cases?—Yes.

1810. Dr. Stock.] The principal improvements you would propose would be to allocate the causes before the lords ordinary, so as to provide against an excess of business before any one; secondly, hearing the causes in the inner house, so as to have a certain time each day, say four or five hours, occupied in court; and thirdly, that some provision should be made against delaying the hearing of causes before the lords ordinary, in consequence of the absence of senior counsel; suppose those improvements introduced, what do you think would be the saving of time, on the whole, in proportion to what is now consumed during the session; how much time would be saved to the public by the introduction of those great principles of improvement?—At present there are causes on some of the lords ordinary rolls that will not be debated for some six or eight months; the whole of that would be gained, because with these changes there would be no arrears at all; causes would be kept up from week to week.

1811. Do you think there would be two months gained in the whole occupation of the judges in the twelve months, by that change of system: suppose that the

the courts sit during the space of five, six or seven months during the year, according to the system you have described, would they be able to despatch the whole of the judicial business in the space of two months' less time, or in what amount of less time?—It is very difficult to calculate. I suppose they might gain a month; but the gain that I more contemplate would be, that the lords ordinary, who at present are in arrear and keep the suitors six or eight months, would not keep them back six or eight days.

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*Lunæ, 6<sup>o</sup> die Aprilis, 1840.*

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## MEMBERS PRESENT :

Mr. Ewart.  
Sir Charles Grey.  
Mr. Serjeant Jackson.  
Dr. Lushington.

Sir William Rae.  
Dr. Stock.  
Lord Teignmouth.  
Mr. Wallace.

THE HON. FOX MAULE IN THE CHAIR.

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Mr. John Riddle Stodart called in ; and further Examined.

1812. Mr. Wallace.] YOU referred in your evidence on a former day to a speech made by the Lord President of the Court at the time the Judicature Act came into operation ; you stated you could give in an extract from it ; can you now give it in?—Yes, I made an extract, and compared it with the printed books of sederunt.

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1813. *Chairman.*] The books of sederunt are a public document?—They are.

1814. This is a true extract?—It is.

*[The Witness delivered in the same—Vide Appendix (F.)]*

1815. Mr. Wallace.] Do you think it would be advantageous to the public to prolong the summer session of the court?—Yes, I do ; I think the vacation is too long ; it retards business very much.

1816. How long, in your opinion, should it be extended?—From the 11th of July, when the courts rise at present, to the 1st of August ; and the winter session, which at present begins the 11th of November, should begin on the 1st of November ; in that way you would gain a month.

1817. Does the opinion you now give relate to the whole court?—It does.

1818. Do your clients complain of the length of vacations, as one cause of delay and dissatisfaction?—Yes, they do, particularly those who, during the vacation, are ready to bring an action into court ; a suitor has no means of bringing his action into court between the 11th of July and the 11th of November ; so that there is one-third of the whole time during which he cannot proceed at all with a suit.

1819. You suggested a remedy, with a view to equalize the outer-house business among the lords ordinary ; would the remedy you proposed be compulsory upon the suitors to any extent?—Yes, it would to a certain extent ; if the party did not enrol his cause, but waited for the following week to get before what he considered his favourite lord ordinary, his opponent might compel him by putting up a protestation ; if the pursuer does not enrol his cause, he is liable to have his suit put an end to by the defender putting up a protestation ; so that, from the fear of having his suit put an end to in that way, the pursuer would, in all probability, enrol within the second week, whether he could get before his favourite lord ordinary or not ; he would take the next best in his opinion, and if he could not get him he would go to the third best, and so on ; and in that way it would operate as a compulsitor.

1820. Do you think that would operate to any extent to equalize the business?—Yes, I think it would, to a considerable extent.

1821. Would you propose a plan to be tried and a rule made for having all the causes of the week equally distributed among the lords ordinary?—I should think this plan which I have suggested would be more acceptable to the profession and suitors ; it would operate to a certain extent, as I have shown, as a compulsitor in certain events, without depriving the agent and suitor altogether of the choice of their judge ; I think to lay down a general rule to deprive suitors of the choice of a judge would be unacceptable, and a more violent change than

**Mr. J. R. Stodart.** perhaps the evil calls for ; what I have suggested would, I think, to a certain extent, remedy the existing evil, and be more acceptable to the profession and the suitors.

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1822. Do the judges at present revise the acts of sederunt which regulate the forms of proceeding at the close of each summer session?—No, I am not aware that they do; I believe that they do not.

1823. Would such a mode of settling doubtful points which have arisen in practice be likely to diminish the time of the judges sitting in court to hear debates in matters of form?—I think it would to some extent.

1824. Would it tend to diminish the expense, and remove the dissatisfaction which is at present said to exist with the court?—It would to some extent.

1825. Do the judges generally call in aid the learned profession in drawing acts of sederunt for regulating the forms of proceeding?—They do sometimes, but very rarely; they occasionally submit the drafts of acts of sederunt to the heads of the legal bodies, but not generally.

1826. Have the writers to the signet and solicitors better opportunities of being conversant with the forms of practice in the Court of Session than well-employed advocates or leading counsel probably can have?—Yes, they have in my opinion.

1827. Does it appear to you that it would be useful to consult all the branches of the learned profession before acts of sederunt are finally settled?—Yes, I think it would be exceedingly useful. The court would frequently get suggestions from practitioners before the court, which had occurred to them in the course of their own practice, and which could not so readily occur to the judges themselves, or to the bar.

1828. It has been given in evidence that the interference with the Court of Session within the last 30 years, by Acts of Parliament for its better government, has been one cause of the insufficiency of the proceedings, and of the dissatisfaction prevailing; is it your opinion that the alleged effects have been produced from the causes stated?—No, I should say not, except thus far, that in my opinion the division of the Court of Session into two inner chambers has produced greater diversity of judgment, both in points of form and questions of law, and in that way there has been an increased distrust and consequent dissatisfaction with the decisions of the court.

1829. *Dr. Lushington.*] You do not remember the state of things prior to that division?—While I was apprenticed, I attended the Parliament-house, that was prior to the division of the court.

1830. You must have been very young?—True, but I remember conversing from time to time with young men attending the court like myself, and I should say at that time there was more confidence in the ultimate decisions of the court than there is at present.

1831. That was prior to 1808?—Prior to 1810; the court was divided in 1810.

1832. The Act of Parliament passed in 1808, and the court was divided in 1810?—Yes.

1833. *Mr. Wallace.*] It has been alleged that the court has been injured by the frequent public discussions which have taken place respecting it; is that your opinion?—No; I think quite the reverse. I think the more the court is open to animadversion and public opinion, the better; the more they are exposed to have their judgments and procedure canvassed by the public, the better, I should say.

1834. *Chairman.*] You do not consider that it is either for the benefit of the court, or for the advantage of the interests of justice, that the court should be continually subjected to be lowered in the public opinion by charges being brought against the judges on the bench of a frivolous and vexatious character?—No; certainly not. When I used the term “animadvert,” I meant that they should be open to public opinion.

1835. Do you think of late years, in which public opinion has expressed itself tolerably freely with reference to the judges of the Court of Session, that much has been said which, for the ends of justice, it would have been better to have omitted?—I have not seen such observations myself in print.

1836. *Mr. Serjeant Jackson.*] Does your testimony amount simply to this, that it is very desirable that the proceedings of the Court of Session should be in the face of the public, that they should have free access?—I would go a little further. I should say that it was beneficial that the procedure of the Court of Session and the conduct of the judges should be animadverted on, as I said before, should

should be alluded to both by the bar and the practitioner. If they had any decided opinion that certain points of practice were erroneous, or that there was great diversity of judgment between the two divisions ; that that should be brought publicly before the judges was, I should say, an advantage, because it would lead probably to their more maturely considering their judgments, and communicating more freely with each other, before they pronounced their separate opinions, and that I should suppose would lead to greater unanimity.

1837. Mr. Wallace.] Have the Acts which the Legislature has passed since 1833, some of them founded on the recommendation of the Law Commissioners, been useful or injurious to the interest of the public?—I think they have been useful.

1838. Dr. Stock.] What is the general scope of those Acts ; are they for the purpose of more fully carrying out the general policy of the Judicature Act?—Yes.

1839. Mr. Wallace.] In your opinion, would the abolishing one of the courts of law afford an opportunity of giving better court-houses to the lords ordinary?—Yes ; the space occupied by the other division would become available to be fitted up for the lords ordinary.

1840. How are the lords ordinary accommodated at present?—Exceedingly ill, in my opinion ; the places where they sit are very small ; when there are two counsel attending on each side, and the agents and their clerks, there is really no room for the public at all ; it amounts almost to an exclusion of the public, contrary, in my opinion, to the principle upon which our courts were constituted, viz., that they should all be open to the public.

1841. How are the inner houses accommodated?—They are accommodated exceedingly well, with very large handsome courts.

1842. Is there plenty of space for the public in the inner chambers?—Yes.

1843. Supposing both divisions shall be continued for a time, at any rate, will not their sitting on alternate days in the same court-room give an opportunity of making convenient and proper courts for the lords ordinary and the public?—Yes, to the extent of the other chamber, which could be fitted up to accommodate some of the lords ordinary.

1844. You have stated your opinion that one of the inner chambers should be dispensed with ; have you taken into account what the saving from that would be to the country?—Yes, I made a rough statement of it ; I made it from 17,500*l.* to 18,000 *l.* a year, including the clerks.

1845. Is the saving of public money your chief object, or any object with which you recommend such a change?—Certainly not the chief object ; I think it of secondary importance ; my chief object is to accelerate business, and produce some uniformity in the decisions of the court, by having one instead of two chambers.

1846. What would be the probable effect on the interest of counsel at the Scotch bar if the judges of the Court of Session were reduced from thirteen to nine?—It would deprive them of so many chances of being promoted to the bench by the number diminished ; there are thirteen at present ; if there were nine, they would then have four less chances of coming to the bench ; but I think with one chamber, and getting through the business more expeditiously, and getting quit of some of that diversity of judgment that now prevails, we should have an increased business, and that counsel would benefit by that increased business ; I am not aware of any other mode in which it would affect them.

1847. Chairman.] Might it not so happen that the increase of business would be so great as to overwhelm one division?—I do not think so ; I stated formerly, when I was examined, that I think the court could easily overtake three times the present amount of business.

1848. Dr. Stock.] One division in the inner house could overtake three times the amount of business done by the two?—Yes.

1849. Dr. Lushington.] With lengthened *vivd voce* discussion into the bargain?—Yes.

1850. Mr. Wallace.] Does not every promotion to the bench spread a certain degree of additional employment over the whole working portion of the profession?—It does ; promotions to the bench have been generally among well-employed counsel and the different leading counsel, and their practice is spread among those who remain at the bar.



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1851. Dr. Lushington.] What particular measures do you think would enable the court to overtake as much as three times the present amount of business?—Perhaps I had better refer to my former evidence in No. 1728.

1852. Then it is your opinion, by relieving the court of the present routine business, and increasing the hours of sitting, three times as much business as is now despatched could be satisfactorily done by one division alone?—Yes, I should say it could, and I can explain it in one word; my former answer understates the extent to which my opinion goes; at present the inner chambers are occupied, according to my evidence, about one hour and a quarter daily, with what I call the proper business of the court, namely, hearing causes in review; now if they sat six hours a day, which, according to the proposal, is what would appear reasonable, that would be four hours and three-quarters additional; and you have to add the proposed increase to the number of days they now sit.

1853. Supposing a court to sit in Scotland to despatch business six hours a day, what additional time do you think the judges must work out of court in order satisfactorily to do their business?—I do not think they would require to work any additional time out of court.

1854. Do I understand you to say, that, provided the judges sat so many hours in court, it would not be necessary for them to read any papers out of court at all, or to apply their minds to the despatch of any judicial business?—Certainly not; but I have already given in evidence that, in my opinion, they read at the wrong time, and read too much.

1855. You have stated in evidence that they read at the wrong time; you do not mean to say that, after the hearing of the argument, they ought not to read the papers?—I stated in evidence that they would not require to read at all in those cases in which they were all unanimous, in consequence of the case appearing quite clear after hearing counsel; there is a great proportion of all the causes which are heard in the Court of Session, which, after hearing counsel, the court have not the slightest difficulty in deciding; they are quite unanimous, and in those causes I should say they would not require to read at all.

1856. Then must they not give their opinion entirely upon the statement of counsel, without themselves knowing that the papers may not by possibility contain something that would alter their opinion?—It is possible, but I should say very improbable; the counsel on the opposite side of the cause would correct any mis-statement of fact on the part of the other which was not on the record.

1857. Is it a safe mode of administering justice to trust to the industry or sagacity of counsel alone to discover whether the observations of the other counsel are well founded in fact or in law?—I should say that no practical evil would arise from it in such cases as I allude to.

1858. Do they form a large proportion of the business of Scotland?—Yes; with all the complaints of difference of opinion in the inner house, a large proportion of the inner-house causes are decided unanimously by the court.

1859. Supposing a divorce case came under the consideration of the court, and the counsel on both sides should agree, would that be a sufficient ground to justify the court in deciding the question without reading the papers?—I should think that would just depend upon circumstances.

1860. What circumstances?—If, from the statement made on one side and the other, there really appeared to be no difficulty at all, I should think it almost amounted to a moral certainty that there was nothing important omitted.

1861. Has not the public an interest in the decision of all such causes, which renders it imperative for the judges to protect the public without reference to either of the parties?—Certainly, as a general principle.

1862. How could the judge effectually do that unless he himself were master of the facts and trusted to nobody?—I still think that the judge could hardly mistake the nature of the case after hearing counsel plead it fully on each side; if it appeared to him from their statement that there really was any difficulty remaining, my opinion is that he ought to let the judgment stand over and consider his papers at home further.

1863. Independently of the interest of the public, are not there a multitude of causes in Scotland in which other parties may have an interest; for instance, in questions of marriage or no marriage, there may be children born whose legitimacy would depend upon the decision; can that decision be safely given without the judge reading the papers?—Certainly not always; but those points would come out in the course of debating the cause.

1864. Mr.

1864. Mr. Serjeant *Jackson*.] You would not have the judges read the papers till after the hearing of counsel, and then in cases only which involved matter of difficulty?—Precisely.

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1865. Would there not be danger in that particular class of cases to which reference has been made, that parties, who wanted to dissolve the marriage tie and to set themselves at liberty, might instruct their counsel so to state and admit matters of fact as to lead the judge to dissolve the marriage when there was no ground for the marriage being dissolved?—They could not state at the bar or admit facts which were not stated on the record.

1866. Would you have the judge look at the record, or not, before hearing counsel?—If I understand the question right, it would imply that there was collusion between the counsel.

1867. Certainly; suppose two persons, as to whom there is no ground for dissolving the marriage tie, wish to be set at liberty, and they get up a suit, and instruct their counsel to state and admit matters of fact, so as to induce the court to dissolve the marriage, whereas there is no proper ground for dissolving the marriage, would there not be a danger in such a case, if the judges did not read the papers?—In questions involving such an important point as legitimacy, I do not expect that judges would decide the cause without reading the papers; but as a general rule in ordinary causes which were quite clear, after hearing counsel fully, and in which the court were unanimous, I think they might safely decide the case without reading the papers.

1868. Then your opinion is, that there are classes of causes in which judges ought to read the papers before hearing counsel?—No; I am not in favour of their reading the papers in any cause before hearing counsel; my opinion is, that there are some causes in which they do not require to read them either before or after, but in all important causes, and particularly where there was a difference of opinion on the bench, they ought to defer the judgment and read the papers carefully.

1869. You would not have them read the record before they heard counsel?—No, not beyond the summons and defences.

1870. Do not you think judges are able to understand counsel better by reading the papers?—No, generally speaking, I think not; they are apt to get prepossessions on one side or the other, and to take up pretty decided views prematurely, which bias it is difficult to remove by pleading at the bar.

1871. Dr. *Stock*.] Does it not frequently happen, according to your view of the case, that causes come before the court in which there can be no suspicion of collusion between the parties, and in which on opening the case to the judges, it appears that there is no dispute about facts, and that the legal conclusion from those facts is for the court to determine?—Yes.

1872. In those cases there is no difficulty in the judges making up their minds, *sedente curid*, without reading the papers?—No.

1873. Mr. *Ewart*.] In that case the judges would get through causes more quickly?—Yes; but in all cases where there is a difference of opinion they ought, I think, to take the papers home and read them, and consider them.

1874. The decision whether they shall do so or not you leave to the discretion of the judges?—Yes.

1875. Mr. *Wallace*.] With regard to appeals to the House of Lords from the Scotch courts, are you informed whether the appeals are increasing or diminishing at present?—They are on the increase; if you take three years now, and three years a considerable time back, they have increased in proportion to the number of litigated causes in the Court of Session.

1876. *Chairman*.] Do not you suppose that the number of appeals to the House of Lords may arise from the desire of parties litigating in the Court of Session to have a final judgment upon their cause in order to set it at rest for ever?—Certainly, that is the object they have in view.

1877. Suppose two parties to be litigating with regard to an estate, and that in the first instance they are satisfied with the judgment of the Court of Session, without appealing that judgment to the House of Lords, is it not perfectly competent for succeeding heirs to raise the whole question with regard to that estate again?—Yes, they may bring a reduction of the decree upon new matter.

1878. Suppose that appeal to have been made in the first instance to the House of Lords, could any person bring a reduction against the decision of the House of Lords?—No, I believe not.

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1879. Then from that circumstance may not we trace to a considerable extent the number of appeals that, on points of property, are made from the judgment of the Court of Session to the judgment of the House of Lords?—Not to a considerable extent; I should say that there is not perhaps one cause in a session of that description.

1880. Mr. *Wallace*.] To what do you attribute the great number of appeals from the Court of Session to the House of Lords?—To the distrust of the judgment of the Court of Session, which arises from the diversity between the decisions of the one division and of the other, and frequently the small majority, in the event of division among the judges; the cause being frequently decided by one vote.

1881. Dr. *Stock*.] You said that a reduction of the decree upon new matter might take place after the decision in the Court of Session; might not that take place in the House of Lords?—I believe not; I believe the decision of the House of Lords is quite final.

1882. But upon new matter could it not be done?—I am not aware that it could come to the House of Lords upon new matter.

1883. Mr. Serjeant *Jackson*.] Do you believe that suitors are sometimes led to appeal to the House of Lords upon the speculation that the English Chancellor may not thoroughly understand the Scotch law?—I should think not often.

1884. Is it often an ingredient in the motive for bringing appeals?—I am not aware; in my opinion it must be very seldom that appeals are brought on that ground.

1885. Are you aware that the Lord Advocate has given that as his opinion?—No, I am not aware.

1886. Is he not a person, from his experience, able to form a judgment upon those matters?—I should say not so well able as a practical agent; he does not come into collision with the parties so immediately.

1887. Mr. *Ewart*.] Are the suitors in Scotland of opinion that there is a greater uniformity of decision in the House of Lords than in the Court of Session?—Yes.

1888. To what do you attribute that uniformity of decision?—I have not formed a decided opinion; generally we consider that the judges of England are more patient and more cautious in forming an opinion than the Scotch judges; greater confidence in the result will arise from that, that the judgment is based upon mature deliberation, and considering the cause in all its bearings.

1889. Mr. *Wallace*.] Bearing in mind the tenor of the evidence you have given throughout, is the Committee to understand that you believe there is a feeling of dissatisfaction with the delay and expense of proceedings generally in the Court of Session?—Yes.

1890. Have you any doubt of the evils complained of being within the reach of easy remedy, if proper means were taken to effect them?—No, I think they could be remedied without great difficulty.

1891. Could the remedy or remedies to which you allude be accomplished by acts of sederunt, or would the more proper way for such important improvements, in which the convenience and the pecuniary interests of so many are concerned, be by Act of Parliament?—I should think an Act of Parliament indispensable; some part of the remedies could not be supplied by acts of sederunt.

1892. Dr. *Stock*.] You state that it is your deliberate opinion that the inner house could be better constituted by reducing the two chambers into one, and one of the reasons that you give for that opinion is, that it would produce greater uniformity of decision; do not you think that the check imposed by two courts of co-ordinate jurisdiction, one upon the other, is a counterbalancing advantage, of which the system would be deprived if your suggestion were adopted; is it not your opinion, that the existence of two courts of co-ordinate jurisdiction, upon questions of a similar kind, must eventually tend to produce maturity of judgment by their acting as a counterbalancing check upon each other?—I do not think it has operated so in Scotland.

1893. Theoretically, do not you conceive that any system must be deficient which is destitute altogether of those controlling checks, as one supreme court controlling all the decisions of the country, would be?—I see that, practically, very great inconvenience has arisen from having two chambers, and I have felt the inconvenience

inconvenience of that; we have had now the experience of nearly 30 years, and I do not think the inconvenience is diminishing. Mr. J. R. Stodart.

1894. In point of fact, do not similar questions come before the two tribunals of review?—They do, very much the same. 6 April 1840.

1895. Do not they occasionally resort to the authority of each other, and consider the decisions given in the other division?—Yes, certainly.

1896. Must not the practical effect of that be, that they act as a court of review mutually upon each other's decisions, and thereby, if there be any thing hastily decided that will not bear the test of scrupulous investigation, those errors are corrected?—Yes, to some extent; but I should be a little afraid that it might operate in a different direction also, there being another court; they might feel, "If we should be wrong in this, it will be put right in the other division."

1897. Will not that act upon the sense that the judge has of his own reputation, in leading him to think, "I must consider this maturely, or I shall be subject to be called in question in another place?"—No doubt they may have in view the avoidance of diversity of judgment.

1898. Mr. Serjeant *Jackson*.] Are the proceedings in those courts reported?—They are.

1899. And therefore the public have an opportunity of judging as to the soundness of decisions that are arrived at by those co-ordinate courts of review?—The publishing of the decisions exposes to the profession at large the diversity of the judgments that have been given, and produces the distrust that I allude to.

1900. Is it not an advantage to the public, in settling the sound construction of the law, that there should be, as you have now in Scotland, two co-ordinate tribunals of review, where you have the minds of two distinct bodies of judges brought to bear on similar questions; is there not great advantage derived from that towards the settling of the law upon a sure and permanent footing; are not the questions likely to be better sifted and examined, and a sound conclusion arrived at upon the points raised?—I do not think in practice it has resulted in that. I have stated before, that the distrust appears to me to have rather increased than diminished, since the court was divided into two chambers, and that I think arises from diversity of opinion between the two courts; and from the great difference that has prevailed among the judges.

1901. Dr. *Stock*.] That cannot be the only cause of the distrust which you say prevails?—No; not the only cause, but one cause.

1902. Mr. Serjeant *Jackson*.] Looking at human nature as it is, if there are two tribunals appointed to decide upon important matters, who are conscious that the grounds of their decision will be considered and sifted by others as good lawyers as themselves, do not you think that that is a motive likely to operate beneficially upon the human mind, even upon the minds of the judges of the supreme court?—I do not think it operates to any great extent, if at all. The judges of the one division, in deciding a cause, may feel that the cause will never occur in the other division. The proper check is the knowledge they have, that their judgment is subject to review.

1903. But must not analogous questions arise in the two courts, though not upon exactly the same facts?—In the course of time analogous questions may arise.

1904. As to points of law that arise, must there not be to a great extent analogous questions in the two divisions?—To some extent, but I should say if there was a deliberate judgment of either chamber formed upon a point, which was the same as one that afterwards occurred, the party would be advised not to try it in the other chamber, if the court had been unanimous.

1905. Dr. *Stock*.] Does not that very circumstance tend to show, that there must be something very wholesome in the existence of two courts of co-ordinate jurisdiction: you put the case of a party being advised, in consequence of the decision of one of those courts, not to proceed further; but if you think he has a chance of succeeding, he may institute his action in the other division; must not the knowledge of the possibility of such a thing occurring operate, in a very wholesome manner, to induce the judges to give a more mature consideration to their judgment?—Perhaps it may to some extent; I should think it would not operate to a great extent.

1906. Mr. *Wallace*.] But in practice there are two courts of review, and the appeals to the House of Lords are increasing?—Yes.

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1907. Mr. Serjeant *Jackson*.] I understood you to say, that the accommodation which is now afforded in the outer house is such as to prevent the courts being public courts at all?—To a very great extent.

1908. It is like a private hearing of the cause?—Almost so; the door is open, but the room is so small, that, practically, it excludes the public.

1909. But, on the other hand, the accommodation for the judges of the inner chamber is so very good, that there is ample access to their proceedings?—Yes.

1910. Is the public satisfaction in Scotland greater or less with the discharge of the business in the outer or inner house?—The greatest dissatisfaction prevails with the inner house.

1911. The business, then, is more satisfactorily transacted by the lords ordinary?—We consider the debates are more patiently heard in the outer house than in the inner house; and that the inner-house judges trust more to their papers.

1912. Is it not rather a curious thing, comparing this part of the subject with the other part of your testimony, that the Scottish subjects are better satisfied with the administration of justice in the outer house than in the inner house, the public being excluded from witnessing the proceedings in the outer house?—It does not arise from that cause; it is a coincidence, but they have no connexion one with the other.

1913. *Chairman*.] Is it consistent with your experience, that the public, unconnected with the profession, take any great interest in the trials which take place before the supreme courts by personal attendance upon those trials?—I should say that, generally speaking, there are not many people who wish or seek to come in.

1914. Mr. Serjeant *Jackson*.] Is there ample accommodation before the lords ordinary for the bar who wish to witness the proceedings?—No, I should say not, in important causes; I have seen many of the bar desirous of going in to the debate in the outer house, and they could not get in.

1915. Is there a place assigned to them in court?—No, there is no place assigned them; there is a single row, which would hold three on each side of the bar, and there are frequently three counsel on each side, and those who are not employed could not get admission.

1916. Is there no accommodation for the writers to the signet?—There is another row behind the bar, where the agents and their clerks sit; then beyond that there is a small passage where those who come as listeners would have to stand crowded up against the wall.

1917. Is there any place for unprofessional men but this passage?—No; there are no galleries, or any thing of that kind, in those outer-house courts.

*Mr. James Johnston Darling* again called in; and further Examined.

Mr. J. J. Darling.

1918. Mr. *Wallace*.] ON your last examination you mentioned a wish to state to the Committee further proofs of the Court of Session passing acts of sederunt to interpret the meaning of ambiguous provisions in Acts of Parliament and matters of form involving points arising out of Acts of Parliament; have you any addition to make to your former statement?—I beg to mention, in the year 1823 an Act was passed, the 4th of George IV., chapter 98, with respect to the granting of confirmations, and in that Act there was a provision about the confirmation of executors creditors, and the application of the creditor to be confirmed was directed to be advertised, "immediately after such application shall be made in the Edinburgh Gazette." A year or two afterwards, and before any question arose upon that clause of the statute, the Court of Session passed an act of sederunt declaring that the advertisement should be inserted within ten days after the application. There was no power given to the judges in the Act of Parliament to make an act of sederunt to explain it, and when the question arose in the year 1837 or 1838, an objection was taken to a confirmation which was expedite at Glasgow, in which the advertisement was not inserted till the ninth day. It was maintained by the party wishing to set aside the confirmation that this was not in the terms of the Act of Parliament, not being "immediately;" but the act of sederunt was quoted, which allowed ten days, and the confirmation was sustained both by the Lord Ordinary Fullarton, and the inner house, first division. That appears to me to be a very recent instance of the court exercising the power of explaining ambiguous terms in Acts of Parliament.

1919. Mr.

1919. Mr. Serjeant *Jackson*.] The court put its construction upon the word "immediately" used in the Act of Parliament; do you think they contravened the Act of Parliament in doing that?—Not contravened, but explained it, which was all I contended for; they did so by act of sederunt before the question arose.

1920. Dr. *Stock*.] Were not those cases constantly occurring; was there not a necessity for doing that?—No; there was no power given them by that Act to make an act of sederunt to explain it.

1921. Do you mean that, before a decision upon the cases you have just quoted, no necessity arose for putting a construction upon the Act?—No question occurred.

1922. But have there not been cases of confirmation of executors constantly occurring?—Yes.

1923. And there must have been some practical rule established by the suitors or by the court?—Yes; I quote the act of sederunt, in that case, as going to show that the Court of Session has been in the habit of explaining Acts of Parliament by acts of sederunt, though the Acts of Parliament gave the court no power to make an act of sederunt for the purpose.

1924. But must not the court put a construction upon the word "immediately"?—Yes; but I understood the Committee to think that the judges had not power to put a construction upon an Act of Parliament.

1925. Suppose an Act of Parliament passed which must govern a great number of matters occurring every week, must not the court, for the guidance of the public in cases that do not come before the court, give some construction?—Yes; that is what I contended for on the last day, and I understood the Committee to say that they had no such power.

1926. Mr. *Wallace*.] In your former examination did you not contend that if the Court of Session had exercised the power which it possessed, in regulating many of the points which had been raised in the 2,000 actions which had been brought and settled at the expense of 40,000*l.*, they might have saved to the public an enormous sum in settling those points?—I contended that they might have prevented a number of them arising by means of acts of sederunt.

1927. And it is to vindicate that opinion which you stated the other day, that you have now brought out the additional instance which you quote?—It is.

1928. So far as you are acquainted with the facts, has the Judicature Act had the effect of diminishing the appeals to the House of Lords from the Court of Session?—No, it has not.

1929. When the judges of one division of the inner house consult the other, within what time is the answer to their question generally given?—I think from about three to fifteen months generally elapse; six or eight is perhaps the average time.

1930. Is the time which each judge sits in the Court of Justiciary regulated by Act of Parliament or act of adjournal, or is it arranged by the judges themselves?—I understand it to be arranged by the judges themselves privately.

1931. *Chairman*.] When you speak of the time, you mean the daily periods?—Yes.

Mr. *John Hunter*, Junior, called in; and Examined.

1932. *Chairman*.] WHAT is your profession?—I am a writer to the signet.

1933. I believe you are of the house of Messrs. Lockhart, Hunter and Whitehead?—I am.

1934. How long have you been practising as writer to the signet?—I passed in the year 1826, but for two years previously I had, I may say, the entire management of a pretty considerable practice in court, as principal clerk to a writer to the signet.

1935. Then we may assume that since the year 1824 you have been well acquainted with the practice before the supreme courts of law in Scotland?—Yes.

1936. Mr. *Wallace*.] Have you had a reasonably fair share of business in your profession?—I have had a fair share of practice.

1937. Has the business of the Court of Session increased of late years or diminished?—I believe that the papers that have been returned will show, and I am sure that, practically, we have felt that it has very considerably diminished.

1938. To what do you attribute the diminution?—I would attribute it to various causes; I have no doubt it has arisen in part from the improvement that has taken place in the administration of our local courts, and the extension of jurisdiction

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jurisdiction that has recently been conferred upon them. That, I should say, is a permanent and growing source of diminution;—but the chief cause, I have no hesitation in attributing to a want of confidence on the part of the public in the mode of conducting and disposing of cases in the Court of Session.

1939. You think the Court of Session as at present constituted and administered does not give satisfaction to the public?—I do.

1940. What do you consider the main sources of dissatisfaction?—There is great delay and confusion in the preparing and hearing of causes in the outer house, and there is a hurried and very unsatisfactory mode of dealing with them in the inner house; I would say, that clients in general complain greatly of both.

1941. Do you consider that the delay you speak of arises from any fault on the part of the outer-house judges?—Far from it; we never had better judges than some of those who now sit in the outer house.

1942. What then do you attribute it to?—I attribute the delay as well as the confusion and uncertainty in the outer house to the imperfection of the system on which the business has been and is conducted; I mean in particular the total want of all proper arrangement or distribution of the various branches of business.

1943. Will you explain the nature of that want of arrangement of which you complain?—In reference to the outer house, I cannot do better than refer to the evidence of one of our most eminent and best employed counsel as given before the Law Commissioners— I mean Mr. Graham Bell; he is not a leading counsel, but just approaching to it; it is in the Appendix to the Second Report, page 11, No. 7.

[*The Witness read the same.*]

1944. The evils to which you have now alluded, are they on the increase or otherwise?—I think they have increased since 1834, when this evidence was given; the result is, that two of our most popular judges are greatly in arrear of their debates; with all their anxiety to press forward their business, they cannot manage to get through more than one case in two days.

1945. To which of the outer-house judges do you allude?—To Lord Moncrieff and Lord Jeffrey; I have made an examination of the rolls of their debates for the last session, and I find that Lord Moncrieff, during the 69 days of sitting, from the 1st of November to the 20th of March, got through only 38 debates, being seven more than one case for each two days of sitting; during the same period Lord Jeffrey heard 46, being only 13 cases more than one for each two days; I should explain that nobody blames either of those lords ordinary for this intolerable state of matters.

1946. It has been stated to this Committee that the overloading of particular lords ordinary, in the way in which Lord Moncrieff and Lord Jeffrey are, arises from some caprice on the part of clients or agents; is it your opinion that caprice is the cause?—I do not think so; for my own part, I generally consult my counsel as to which of the lords ordinary he thinks it will be best to take a particular case before.

1947. And then you decide upon going to the best judge?—Of course our wish is so to decide.

1948. Mr. Serjeant *Jackson*.] Are you at all governed in that selection by supposing that a particular judge may have a particular view of a particular subject?—No doubt occasionally we are.

1949. Mr. *Wallace*.] You have stated that dissatisfaction is also felt as to the mode of conducting business in the inner house?—Yes, very great dissatisfaction, I should say.

1950. From what does that arise?—I think, in the first place, that the judges, from a mistaken continuance of old habits, acquired when all the arguments were written, have hitherto considered it necessary to try to make themselves masters of the facts, and even to form their opinion upon the law of cases, before having heard counsel; they generally come into court, as it appears to us, and I believe to counsel (at least so far as I have heard counsel speak upon the subject), with their minds made up; and they exhibit considerable impatience when counsel wish to go into any thing like a long discussion; I would refer, on this subject, that I may not appear to state merely my own impression, to the evidence given by the Dean of Faculty, as quoted in the First Report of the Law Commissioners, page 41.

1951. Have



1951. Have you any other reason for the opinion?—Yes; I think the time of sitting in court for hearing cases is so short that it is impossible they can be heard satisfactorily.

1952. Is there any other reason?—I think great confusion arises from the mixture of formal and routine business with the hearing of cases for judgment.

1953. Will you state to the Committee what you mean by formal and routine business?—I mean, in the first place, matters of course;—but I have taken a note of what I allude to in the answer which I have now given to this question.

1954. Please to read it?—First, the roll of single bills; all reclaiming notes against judgments of the lords ordinary, and new applications of every description, are entered in this roll in the first instance; their titles are read over by the presiding judge, the reclaiming notes are ordered to the roll for hearing, and new applications are appointed to be intimated on the walls or in the minute-book, or to be served on the opposite party,—or the like. No objection can be stated when the cases are called in this roll, except that of incompetency; this is not done once in 100 times and only as regards reclaiming notes. Secondly, there are a great variety of mere formal motions, such as for approval of auditors' reports, where no notice of objection has been lodged; for reponings against decrees in absence or by default for diligences; for leave to print, for matter-of-course remits to accountants, for fixing or altering the place of trial, in jury causes; for a view by the jury, &c. I think, as to all these, that they might be got rid of at once by having the roll run over or purged by one of the principal clerks of session, as recommended by the Law Commission in reference to similar proceedings before the lords ordinary, subject, of course, to appeal or report, on points of importance, or where the matter appeared to be one of difficulty. In the third place, I think the inner house should be relieved entirely of all incidental applications and mere formal proceedings, and of various other matters which now originate there in the first instance, such as (in the first place) petitions for the appointment of judicial factors, *curators bonis*, and the like, and the procedure consequent thereon, viz., applications by factors and curators for additional powers, or for an audit of accounts, a recall of the factory, and so on; secondly, petitions for recall of the diligence of inhibition and arrestment, which often pass without opposition when security is offered. Thirdly, processes of proving the tenor. Fourth, proceedings in processes of ranking and sale, including innumerable incidental applications arising therein, for fixing up-set prices, granting warrants of sale, reduction of previous upsets, recall of circumduction, authority to make interim payments, auditing the factors' and common agents' accounts, &c. Fifth, actions of aliment. Sixth, applications under Acts of Parliament for sale of entailed estates, in order to pay entailers' debts, or to re-invest the prices in the purchase of other lands or for redemption of the land-tax. These last form a very numerous class of cases, and take up a great deal of time, I think, very uselessly and very expensively.

1955. Sir *W. Rae*.] Are not most of these last-mentioned duties devolved upon the judges under special Acts of Parliament?—Yes.

1956. As regards the appointment of judicial factors, is not a very great power exercised in granting those appointments?—There certainly is.

1957. Do not you think, that if the Court of Session are to appoint individuals as judicial factors over estates, it is more suitable that that power should be intrusted with the inner division of the court than with a lord ordinary?—It is, in effect, done only by one judge, even when it is done in the inner division.

1958. Is not the proceeding more public than the proceeding that is conducted before the lord ordinary?—I do not think that it can be considered more public; of course the lord ordinary's court is open to the public too.

1959. *Chairman*.] You say it is done by one judge?—It is done by the head of the court; the other judges do not appear in general to take any part in those proceedings.

1960. The other judges are present?—Yes.

1961. Sir *W. Rae*.] The application is printed and delivered to each of those judges?—Yes.

1962. Dr. *Lushington*.] Do you propose to transfer that to one of the lords ordinary?—Yes.

1963. Sir *W. Rae*.] Do you think that would be better, taking into account that the lords ordinary have now more to do than they are able to accomplish?—Yes, if proper arrangements were made.

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1964. And also taking into account that the proceeding would be in a more private manner than it is before one of the divisions?—My own opinion is, that the reduction of two lords ordinary has been too great; I consider that it would be desirable to have an additional lord ordinary.

1965. Mr. Serjeant *Jackson*.] What is a judicial factor?—A person appointed by the court to take charge of property, either the property of a minor or of a person in a state of fatuity, or the like; or, if there is a sequestration of estates for debt, a person appointed to take charge of property in that situation, to collect the rents, &c.

1966. It is analogous to what we have in the English and Irish courts of equity called a receiver?—I presume so.

1967. Sir *W. Rae*.] How long may it take now to dispose of those matters to which you have referred?—If you put them altogether and take the average, my impression is, that it takes up very nearly half the time that the inner-house judges sit in court, taking that upon the average also.

1968. What is the average space of time occupied in disposing of those cases which you have alluded to?—I should say, from three quarters of an hour to an hour; there is generally more time taken towards the end of a session in those incidental matters than at the beginning.

1969. Then there must be some debate and discussion, if it takes so long as that?—It is from their number and variety.

1970. How long would one of them take?—It depends upon its nature; I have mentioned a great variety.

1971. Take the case of a judicial factor; does not the Lord President state that the petition is for a judicial factor, and grant a judicial factor, as a matter of course?—The counsel at the first calling rises up and asks it to be intimated.

1972. Does not the judge, in general, direct it immediately?—Yes.

1973. What length of time will that take?—A very short time.

1974. Then there must be a very great number indeed to take up the space of time you have mentioned?—I did not say it was the applications respecting judicial factors that occupied the time of the court; I have given the answer in reference to a great many matters.

1975. Will you mention matters in reference to which there is generally any discussion?—There is very frequently a discussion upon some of those motions which are made in court, which I think would be saved if the clerk went over them beforehand; the agent or the counsel would generally come to one upon most of them.

1976. But taking the court as now constituted, do you think it would be an advisable improvement to remove those things from the inner division and take them before the lord ordinary?—Yes; I think it would secure uniformity in those matters, which are now differently treated in the different divisions, in many respects.

1977. Will you explain how they are differently treated; the appointment of judicial factors, for instance?—That I do not allude to; but if a factor applies for additional power, such as to sell property or borrow money, one division will grant it, as a matter of course, while the other will refuse it entirely.

1978. Would there be no danger of the same thing occurring if it was before the lord ordinary?—I think not, if it was one lord ordinary.

1979. *Chairman*. If there was but one lord ordinary to dispose of that, do you think there would be no jealousy on the part of the public of that power being improperly exercised?—I think not; it is not at all likely that the lord ordinary would have any improper bias in the appointment of a factor.

1980. Mr. Serjeant *Jackson*.] Do you mean, upon the same state of facts, that there are those contradictory decisions of the two divisions?—I do; I have known cases where the judges of one division would state in reference to an application, "We are not in the habit of granting these things in this division;" I have known of that myself.

1981. That was rather a hint to go to the other division, was it not?—The other division could not then have been gone to; if an application is made to one division for the appointment of a factor, the factor must go to that division with every application arising out of that factory.

1982. Sir *W. Rae*.] Has the party the choice at first which division he will go to?—Yes.

1983. Mr. *Wallace*.] You have stated several causes of dissatisfaction; have you any other cause to state to the Committee?—Yes; I think there is a great uncertainty both as to law and practice.

1984. How

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1984. How do you account for that?—By there being two co-ordinate courts of equal jurisdiction. There is also, I think, frequently, I would say almost constantly, great difficulty occasioned to one or other of the parties in a cause, in procuring the services of senior counsel, from their being engaged in a different division; the result often is either that both parties lose the benefit of the senior whom they have feed at great expense, or that one gets an advantage from his senior being present and the other's being absent; the court in such a case frequently requiring the junior to go through with the case, though there are both senior and junior to oppose him on the other side; in other cases it happens that the case is put off altogether when both or either of the senior counsel are engaged in the other division; the juniors are naturally averse to going on in the absence of the seniors; they frequently state that the seniors are anxious to be heard, and in this way cases are delayed for weeks; and the court, having no more causes set down, breaks up at an early hour.

1985. You have seen that take place frequently?—I have; it has occurred several times with reference to my own cases in the course of the last session.

1986. You have spoken of senior and junior counsel; what do you mean by senior?—Leading.

1987. Is the term "leading counsel," in familiar use in the Scotch courts?—I should think so; we generally speak of "leading" as contradistinguished from mere "seniority," because there are many of our leaders who are very far from being the seniors.

1988. You think that two inner chambers are disadvantageous; will you state the evils which you consider to arise from that source?—I would say, first, that it leads to conflicting and inconsistent decisions, and consequent uncertainty in the law; secondly, that much time is lost to the public and to practitioners from endeavours on the part of the judges to avoid those consequences by consultation with each other, or by questions being sent by one division to the other; thirdly, I would say, that those consultations and hearings in presence of the whole court generally take place at hours when the ordinary business of the court should be going on, and counsel and agents are frequently kept idle for hours in the Parliament House, when they might be more usefully employed elsewhere; I think, in the fourth place, that it is a great evil, the want of uniformity of practice as to some of the routine matters to which I have alluded, and as to points requiring the intervention of the court *ex nobili officio*; in the fifth place, I have already spoken of the inconvenience occasioned by the withdrawal of counsel from the lords ordinary, in consequence of the two divisions sitting at the same time, and of the delays caused in the divisions themselves from the same source; were there but one division, those evils, as to the inner house would be entirely removed, and, as to the outer house, would be greatly alleviated.

1989. Supposing such an arrangement to be made, do you think counsel would suffer by the change?—I think not; I think parties would cheerfully pay higher fees for the services of senior counsel if they were more certain of securing them than they do at present, when it is a mere chance whether the fees paid will not be found to have been entirely thrown away.

1990. Are you of opinion that one chamber would be able to go through all the business that would come before it?—I think it would be sufficient to get through all the business that ought to come before it; but of course various new arrangements would be necessary under those circumstances.

1991. Would one of those arrangements be to prolong the sittings of the court?—Yes; I think the judges would have to lay their account with sitting at least twice as long in court as they do now; I do not think this would be a great hardship in any view, seeing that the lords ordinary, who have more to do at home in reading, and worse reading too, viz., that of written papers, generally sit five or six hours a day in court. I should like to refer on this point to the evidence of the Dean of Faculty, as given in the Report of the Committee on Judges' Salaries, page 58; he there says, in reference to the lords ordinary, "Their reading is, I believe, even more laborious, because the papers are not always printed for them, which makes it more difficult for them; and there is a great proportion of cases in which their judgment is acquiesced in, and which are not carried to the inner house. The lords ordinary read all the pleadings before they are finally settled, and as they must afterwards study them before they decide their cases, their labour is extremely severe and constant; I do not know a more laborious life than that of one of the lords ordinary."

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1992. You state that the lords ordinary have more trouble in getting through their work, because they have to read from manuscripts; will you explain to the Committee why the lords ordinary do not have the advantage of printed papers, seeing that the papers which are laid before them might be submitted in a printed form for hearing in the inner chamber?—They may never go further than the lord ordinary.

1993. But provided they were to go further, they would be printed?—One never knows that till afterwards.

1994. What should be the hours of sitting of the inner chamber, provided the changes which you have alluded to were given effect to?—My impression is, that if they sat from 11 till 4, they would have no difficulty in getting through the business; and I think it would be an advantage that they should not sit sooner than 11, however much later they might sit than 4, because this would give the lords ordinary the advantage of having counsel free for debates in the outer house till 11, without being interrupted by the inner house.

1995. Then the judges would have to read at home?—Certainly not to the extent they are said to do at present; a great deal of previous reading at chambers may with advantage be done away; I would refer upon this point to the evidence of the Dean of Faculty, which is quoted in the First Report of the Law Commissioners, pages 40, 41 and 42.

1996. Would the judges require any reading at all, according to your plan?—I speak of previous reading;—this, I think, might be abandoned in all cases, except where written pleadings had been ordered; no doubt the judges would still require to look into the papers after hearing counsel, but that would be chiefly for reference; they would know from the pleadings what it was necessary for them to read, and I should think the labour would be light indeed, in comparison with what they undergo at present.

1997. Is it supposed that the judges at present are obliged to read all the printed papers laid before them?—I should think by no means; a great number of documents, such as deeds, statements of accounts, correspondence, and the like, are laid before them for reference only. I would say that agents do not like in general to curtail documents, for fear of imputation by their opponents of unfairness or of garbling; when there are cases, the judge sees from them what it is necessary for him to read, and this may often be a paragraph only in a long document.

1998. Dr. Lushington.] How can the judge know that no other part of the document can apply to the question?—The parties take good care to tell him what he should read. If there are written pleadings, he will see from them, and if the pleadings are oral, the counsel will always point out the papers necessary to be read.

1999. Do you think that would be sufficient?—I do in the general case; of course there may be, and must be, many cases, where papers are laid before the judges which they must read entirely.

2000. In pronouncing an opinion upon a very long deed of entail, would it be sufficient for the judge to take into consideration the part only to which the counsel on one side or the other referred?—That would depend upon the nature of the question; there are some cases where the question arises upon a particular clause only in a deed of entail.

2001. In a deed of entail, can a party pronounce any opinion upon a clause without looking through the whole deed to see that there is nothing contradictory?—After he has heard counsel upon the question which arises on the deed of entail, I should think that he would have no difficulty in knowing whether it was a question of that nature which required him to look beyond the clause.

2002. Suppose the counsel to be hurried, and not to be able himself to read the deed, he would hardly be able to tell the judges "There is nothing in this deed that may not apply to the question"?—That is a possible case, but I should think it an improbable one.

2003. Do you think the counsel are always perfectly masters of all the documents in the appendix?—They are,—that is, the counsel who have been in the case from the beginning; and I have never known an instance in my own practice where anything which is in the papers that may affect the decision of the case has escaped the notice of the counsel, the agents, and the parties.

2004. Does the court never discuss a new point, or suggest new matter for consideration, when they are adjudicating a question?—Of course, but it is seldom from an omission on the part of the parties to point out sufficiently the particular clauses in the documents that go to the question; there may be many questions of law

law which occur to the judges, but it is seldom that important parts of the documents which have been in the hands of the agents from the beginning have escaped the observation of the counsel and agents.

2005. Upon the whole, would you not prefer, if a judgment was to be pronounced upon a case in which your client had a deep interest, that the judge should read the papers before he pronounced his judgment, rather than take the statement of counsel in reference to them?—I would, certainly.

2006. Mr. *Wallace*.] You are of opinion that the judges cannot be too well informed by means of papers and counsel together?—Certainly not; but questions on deeds of entail are peculiar cases; I do not think that affects my opinion.

2007. Sir *W. Rae*.] Do you think a deed being of great importance in the cause, a judge would be justified in looking merely to the extracts referred to in the debate?—I do; I do not think, for instance, the judges would read the descriptions of the lands; we, the agents, print the whole of many documents solely because we do not like it to be imputed that we garble them.

2008. Dr. *Lushington*.] I will suppose the question to arise, whether an agreement is constituted by certain letters which are exhibited on the one side and the other, must not the whole of the correspondence in such a case be perused?—Yes; the parties in such a case would tell the judges they must read the whole, because it is from a purview of the whole that they must come to a conclusion.

2009. Take the case of a question of title depending upon various deeds; must not all the deeds be read?—I should think upon a question of feudal title, they would never require to read the whole of the deeds. The objection, for instance, may be, that you have passed over a superiority or the like; those are questions where the judges would not require to read all the deeds.

2010. The judge may not require to read the deed, but the judge ought to be as much master of the deed as the counsel; the counsel would not, perhaps, read the whole of the deed?—Certainly; and I think the judge might generally be so, without reading nearly the whole.

2011. Mr. Serjeant *Jackson*.] Would it not be a very unsafe thing for the judge to take the statement of counsel as to what the import of it was?—Of course it would; what I mean to state is simply this; that in cases where the matter in dispute is disposed of by *viva voce* hearing, and in other cases where it is disposed of upon written cases—from the oral pleading in the one case, and from the written papers in the other, the judge will be very well aware what it is necessary for him to do in the particular cause, as to reading.

2012. The practised eye, the eye of a lawyer or a judge, would very readily pass over those parts of a long instrument which were not of importance, and fix upon those parts which were essential, and he would apply himself to those parts which were important, affecting the question before him?—Yes; for the very purpose of enabling the judges to do so, it is our practice to put running margins specifying each clause, so as to show them what the course of the deed is, and they know which of those are merely technical clauses, and which it is important for them to read.

2013. Like the marginal notes in an Act of Parliament?—Yes.

2014. Mr. *Wallace*.] Is there any other portion of the duty devolved upon the inner house judges of which they might be relieved?—I think a much greater saving than that which would arise from the abandonment of previous reading might be gained by removing from the inner house, or at least from the whole of the judges when met to hear causes, the mass of mere formal and routine business which at present occupies nearly one half of the time of both divisions during the session, and fully one half, if you include the greater proportion of time that is occupied towards the close of each session. Those matters, I conceive, have continued to be carried on in the inner house from the same sort of notion which caused all proceedings in sequestration to be retained there so long. These last are fully as important, I should say ten times more important, than the appointment of judicial factors; yet these are now disposed of by the lord ordinary on the bills. The notion I allude to seems to have been derived from the times when the whole court used to sit upon every case, and it was supposed that a quorum of the whole judges was necessary for every judicial act. I do not know why such matters should continue to load the inner-house rolls, and waste the time of the inner-house judges. I may also say, that I am sure they would be done at one half the expense, and, in my opinion, with a much more close and effective superintendence, by one lord ordinary. In point of fact, the real work is very generally

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done, even at present, by the lords ordinary ; that is to say, the court remits to the lord ordinary to inquire into the facts and report; the lord ordinary next remits to an accountant, or to a writer to the signet, if it is a case more fit for being disposed of in that way, or to the clerk of court, who reports to him, and then his lordship, after examining the proceedings, reports to the inner house, and we have to go there with all those reports printed at a great expense ; at each appearance in the inner house we require to have counsel present, and to pay fees to the counsel ; in the inner house, when we do come there, the general way of dealing with the matter is, that the head of the court asks the clerk if the lord ordinary has reported that all is right ; if he states that he has, then the prayer of the petition is granted ; the thing asked for is done. Now, I have never been able to see why that should not be all done by the lord ordinary ; of course I would always suppose that there should be the power of appealing from the judgment of the lord ordinary, as there would be in any other case. Then, with reference to applications that take their rise, according to our present forms, in the inner house,—a party, for instance, petitions for recall of the diligence of inhibition or arrestment which has been used against him upon a depending suit ;—he puts in a printed petition to the inner house, and he offers to find security, upon the diligence being recalled ; if the other party is satisfied with the amount of security offered, he appears, and states that he has no objection to the diligence being recalled upon those terms ; and that is done by the inner house. It might be equally well done, I should think, and at infinitely less expense, in the outer house.

2015. Would counsel suffer from the removal of those proceedings to the outer house ?—I think they would, but not to one-half the extent that the agents have suffered, and without one word of complaint having been heard from any quarter, by the changes which have taken place as to the forms of diligence, and of advocations and suspensions.

2016. Do you consider that the inner house should be as much as possible converted into a court of review for appeals from the lords ordinary ?—I consider so.

2017. *Dr. Lushington.*] Supposing all this business was transferred from the two divisions of the inner house to the lords ordinary, would the present number of lords ordinary be sufficient ?—I do not think at first it would ; it would require an additional lord ordinary for some time.

2018. Are you of opinion that it would be advisable to distribute the business equally among the lords ordinary ?—I would be very loth to give up the right of choice.

2019. As long as there is the right of choice, the business must accumulate in the hands of some lords ordinary, must it not ?—Yes,—but I think a middle course might be taken, because the evil is very great at present ; it remedies itself, however, to a certain extent, and I do think it operates as a beneficial check upon Government in appointing judges, that the agents, counsel and parties should have the choice of lords ordinary, because the state of the rolls always points out what the sentiments of those parties are as to the particular merits of the existing lords ordinary. I have made a table of all the new causes which have come into court during the last session, and the different lords ordinary before whom they have been brought ; I find that the new defended causes which have come before Lord Moncrieff are 44 in number ; before Lord Jeffrey, 87 ; before Lord Cockburn, 73 (Lord Cockburn has no arrears) ; before Lord Cuninghame, 224—it is that I allude to, when I say that the evil so far cures itself—(Lord Cuninghame had no arrears at the beginning of the present session ; I dare say he will have some soon) ; before Lord Murray, 30.

2020. For what period is that ?—From the 1st of November to the 20th of March this year.

2021. Lord Cuninghame is at present the heaviest burthened ?—Yes, with new causes,—and I suppose we shall now go to the judge whom we consider next best.

2022. *Mr. Wallace.*] With regard to the reduction of one inner chamber, would the reduction have the effect of doubling the number of appeals to the single court ?—It would, in the first instance ; that is to say, the whole business which goes to the two courts at present, would go to one ; the whole business, I mean, which would be left for the inner house to do, if the routine business and such matters as I have spoken of were removed from the inner house altogether.

2023. Are you of opinion that the inner-house could overtake all those appeals without getting into arrear ?—I think they could, if proper arrangements were made, and the judges were to give their cordial co-operation.

2024. What



2024. What arrangements do you allude to?—I would begin by more than doubling the length of the time of sitting in court; I would add three hours to the present average time spent in court; in the second place, I consider that all the time that is lost by delay in waiting for counsel when they are in the other division would be saved; and thirdly, I would add, if it is found to be necessary (which I do not think it would), one or two months to the length of the session, which the court is authorized to do by the Statute of 2 & 3 Victoria, chap. 36. sec. 10.

2025. Are you quite satisfied that those arrangements would be such as to prevent arrears?—The result may be stated in this way; the two inner houses, even with their present brief sittings, nearly half of which is devoted to formal business which would be better done elsewhere, are more than able to keep pace with the cases brought under review; indeed, they appear to have some difficulty in spreading out the business so as to embrace the whole period of the sessions; now, if you take away the formal business, they could, according to the present practice, get through nearly double the number of cases; if you add three hours to the two now allowed for sitting in court, they could hear, and consider these cases more than twice as well as they now do; but if that were not enough, I would prolong the sittings for one or two months a year, as the business may require, which would add more than one-sixth or one-third respectively of farther time for hearing and disposing of cases.

2026. *Dr. Lushington.*] In what way do the judges now spread out the business?—I observe that they only put out two cases a day; I believe there are one or two instances only in which more have been put out; many are not long cases; most of them have been a good deal sifted before the lord ordinary, and I should think, by their sitting even three hours, they might put out more.

2027. If they endeavoured to spread out the business, and make an appearance of being more occupied than they really were, might they not do it by sitting and hearing counsel more fully than they do?—Of course, if the judges had wished to sit longer in court they could; but the habit has been very long prevalent with us of having very little done by the inner-house in court, and I do not think we have yet got over it; I do not attribute any blame to the judges.

2028. *Mr. Serjeant Jackson.*] When you used the words "spreading out the business," do you mean to convey that the judges wish to have it believed that they have more business than they really have?—By no means; what I mean is simply this, that they might put out more cases, and would put out more cases in the day, if they thought there was any necessity for it. On looking at the amount of business which they have to get through, if they found they could not get through what they had to do without putting out three cases a day, I think they would put out three cases a day; I find they put out only two; I may be wrong, but my impression is, that their reason for putting out only two is, that that will be sufficient to enable them to get through the business.

2029. Do you imagine that it would be an improvement upon the present mode of doing business in Scotland, to have all the causes enrolled in the list, to go through them in their order, and to expect that the counsel and parties should be ready in the causes to which they might arrive in the course of the day's business?—I think, to a great extent, that might be done, though not to such extent as to leave it entirely doubtful when the cases might be called;—but I think it would be desirable that a few more causes should be set down, even though they might possibly not be reached, and in that way the counsel would merely require to be prepared two or three days earlier than is at present necessary.

2030. It frequently happens, from the practice of putting out two causes for the day, that those causes turning out short or going off the court is necessarily obliged to rise at an inconveniently early hour?—I have had experience of that myself upon three different occasions in the course of last session, when, from the absence of the seniors in the other divisions, we could not go on; the juniors were unwilling to go on, because the cases were cases of some difficulty, and the seniors were desirous of addressing the court upon them; the result was, in two out of three of those instances, the court was obliged to rise earlier than it would have done, and the cases were thrown off for some weeks.

2031. Supposing the counsel were in attendance, from the cause involving a narrow question, not calculated to take much time in debate, might it not happen, from the circumstance of two causes only being put in the list, that the court would have to rise earlier?—Yes, they frequently rise much earlier than they themselves have anticipated.

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2032. Then it would be a manifest improvement and tend very much to expedite the despatch of business in the Scotch courts, if the judges were to make out the day lists consisting of a greater number of causes?—Yes; but I would not say that that should be carried indefinitely; not more than one or two should be put out beyond those that might in ordinary circumstances be expected to be heard.

2033. In ordinary circumstances, one day with another, what number of causes would the judges dispose of, suppose they sat in court four hours a day?—I think four hours would be too short a time.

2034. Suppose they sat five hours a day; how many causes do you think they could dispose of upon the average, taking one cause with another?—My impression is that they might get through double the number of causes which they hear at present; and I should say a great deal more, if they are only to hear them as they do at present.

2035. Sir *W. Rae*.] You think that they do not hear the counsel sufficiently at present?—I do.

2036. Supposing them to have the same business that they have now, what length of time do you think they ought to occupy in court in hearing cases?—I think about double the time in general would be sufficient; they might hear counsel at a satisfactory length by sitting four hours instead of two.

2037. With the present business you think they ought to sit four hours?—I do, including in that the formal business; if the formal business were taken away, I think they might get through the present business and hear counsel satisfactorily by sitting three hours a day.

2038. Then suppose one division to take the business of both courts, they would have to sit six hours a day?—Yes, they would have to sit six hours a day upon some occasions, and I should say six hours a day should be the understood time.

2039. That would lead to the court sitting till five in the afternoon; would that be convenient to the bar of Scotland?—I am sure it would be more satisfactory to the public than the present system; there might be some slight inconvenience felt, I have no doubt.

2040. You think that the judges sitting six hours a day, having to dispose of those causes, would be qualified at night to read the papers?—The lords ordinary very frequently sit six hours a day, and I have read, from the evidence of the Dean of Faculty, a paragraph in which he states that they have a great deal more reading than the judges of the inner house.

2041. Are not the judges of the outer house younger men in point of age than those of the inner house?—Yes.

2042. Do you make no allowance for that?—There must be an allowance made, but I should suppose a judge must be always taken to be able-bodied enough to go through his work.

2043. To an extent of duty, such as you have mentioned now, sitting six hours a day and studying the papers at night?—I may have exaggerated a little in saying six hours a day, but my impression of the matter I will now state to the Committee: supposing there were five lords ordinary for deciding causes, I find from the evidence given by Lord Jeffrey before the Committee upon the Judges' Salaries, that Lord Jeffrey states the number of judgments of the lords ordinary that are acquiesced in as amounting to more than one-half, and my own impression is that the average of cases finally decided in the outer house for the last five years would now considerably exceed one-half of the whole litigated causes; I am also of opinion that the average would go on increasing to a considerable extent further, supposing the new arrangements to which I have alluded were carried into effect; first, because the lords ordinary would have it in their power to devote more time to the consideration of their cases; secondly, because I find from the reports that a very great proportion of the cases decided since the passing of the Judicature Act have been questions regarding the forms of process, almost all of which were at first appealed to the inner house; I may mention that there are 1,300 decisions on points of form reported between 1815 and 1834, being 18 years; there were, of course, many others which it was not thought necessary to report.

2044. Dr. *Lushington*.] Have you compared it with the number of decisions on points of form in the 18 years that preceded it?—I have not, but they were very few in number in comparison; the 1,300 would afford about one case for each two days during the 18 years referred to; those questions are of course daily diminishing in number, and must ultimately nearly disappear, as the forms become better understood, and more fixed by practice; it must not be overlooked, besides, that

that in a number of cases the questions at issue between the parties are much simplified, and greatly narrowed, by the sifting which they undergo before the lord ordinary, so that it most frequently happens that a few only out of a great many points that have formed the subject of discussion before the lord ordinary come to be mooted in the inner house; in this way it would but rarely occur that the same length of discussion would be requisite for the disposal of a case in the inner house which it might properly and necessarily have undergone in the outer; supposing there were five lords ordinary (I think four would soon be sufficient) for hearing and disposing of litigated cases, and one half of the cases disposed of by them were to be appealed to the inner house, I cannot doubt, when it is taken into view how many of those would be cleared of apparent difficulties, and reduced to a more manageable compass by the labours of the lord ordinary, that, supposing a cordial co-operation on the part of the judges, the whole might be got through, without the risk of any permanent arrear, by one chamber of review.

2045. Mr. Serjeant *Jackson*.] Do I understand you rightly as stating that at present the ordinary time occupied by the lords ordinary in the despatch of public business is about six hours?—They sit generally five and often six; I have often known of their sitting for six hours; some of the lords ordinary, in particular, who are pressed by arrears, frequently sit six hours.

2046. Is the pressure upon certain judges always upon the same judges, or has it been a fluctuating run upon particular judges?—Of late years the pressure has rather been heavier upon some judges than upon others.

2047. It has varied at times?—Unquestionably.

2048. Mr. *Wallace*.] You have spoken of several leading counsel; how many leading counsel do you consider there are at the Scotch bar?—Now that we have lost the Lord Advocate, who is, I am sorry to say, very seldom among us, I think there are about four decided leaders.

2049. You state there are six courts which meet on the same days, and sit during part of the day at the same hour?—There are four of the five lords ordinary, who sit every day, and the two inner houses.

2050. So that there is not a leading counsel for each court?—There are two or three counsel, who are rising gradually and will soon be taken in as leaders; as we find we cannot secure those who are leaders at present, that must gradually take place.

2051. So that the number of leading counsel runs something between five and seven at present, including the Lord Advocate?—Yes, I should say so.

2052. How many well-employed counsel may there be at the bar?—If I should say between 20 and 30, I should be giving large measure.

2053. Is that independently of the leading counsel?—No; I was including them.

2054. Questions have been asked of you several times, with respect to what you propose to do with the mass of the formal business which you have recapitulated; have you stated distinctly your views as to how it should be disposed of?—Not quite. I think the proper course would be, that one of the lords ordinary (an additional one would I think be necessary in the first instance) should be appointed, before whom all incidental applications and formal proceedings should be brought; and as this would not nearly occupy all his time, I think he should also superintend the preparation of causes for discussion and trial, and hear at chambers all incidental motions arising in the course of the preparatory proceedings, which the clerks or the agents could not satisfactorily arrange or dispose of.

2055. Do you think one additional lord ordinary would be sufficient for all that business?—I do; and in course of time I think a great part of that business might be worked off; that is to say, that the lord ordinary might gradually relieve himself of a great deal of the procedure in the preparation of causes, by leaving it to the parties and their counsel to settle the statements and the pleas.

2056. Do you consider that it would be an advantage to have cases prepared by one judge rather than by judges who are eventually to dispose of them?—I do; I think it would produce much greater uniformity in the mode of framing records. It would gradually lead to greater correctness in point of pleading, and in process of time it would enable the judge to realize the views of the Law Commissioners, by leaving the framing of the records pretty much in the hands of the parties and their counsel; but I would say, further, that my own impression is that it is much better that the judge who is to decide a cause should see and hear nothing of it till the statements and the pleas of the parties are complete;—otherwise he is apt to be biassed by impressions taken up at early stages of the cause, which may be quite erroneous, and must often be extremely injurious to the parties. All that is necessary in this respect to the right decision of a cause seems to be that the

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record should be correctly framed, and this object, in my opinion, would be much better secured by having one judge to superintend the preparation of all the records than by leaving them in the hands of a variety of judges.

2057. Do you think it would also be an advantage to have all the formal and routine business to which you have spoken done by one judge?—I do; in point of fact at present the routine business of the inner houses is done by the heads of the respective chambers, that is, by one judge in each division; and by transferring it to the lord ordinary we should get an uniformity of practice, which does not exist at present; I think, moreover, that the superintendence and check would be much more effective.

2058. Do you think it would be desirable that the junior lord ordinary should be confined to the preparation of records?—I think it would be a good school in which to familiarise him at the outset with matters of form, of which sometimes judges at first are not fully cognizant.

2059. Dr. Lushington.] Do you think that the junior lord ordinary should never decide a case?—I think it would be an advantage perhaps that he should be called in in case of equality.

2060. Sir W. Rae.] Do you think it would be desirable that the youngest lord ordinary should be called into the inner house to decide a case, rather than the senior lord ordinary?—No person should be appointed a lord ordinary who was not competent to deal with a question of law.

2061. Do you not think experience so important that a senior lord ordinary would be better than a junior?—I do not know that it is necessary to call in any lord ordinary when you have one in the outer house deciding the case, but if a judge was competent to decide a case in the outer house, I should think him competent to decide it in the inner house, especially after it had undergone a great deal of previous sifting.

2062. Do you think that would be a more satisfactory way of disposing of the case than if the opinions of the whole judges were taken?—In those cases there is so much difference of opinion that we are more disposed to recommend appeals than we should be if the number of judges was smaller, and there were more unanimity.

2063. Do you think that where the court was equally divided in opinion, and the junior lord ordinary was called in to make a majority on one side, that that would more satisfy the parties than the present practice, where one division of the court is called in?—I do not think the number of appeals would be increased; as to its being more satisfactory to the public, I cannot answer that, there being no experience as yet on that point; but the present mode is not satisfactory to litigants; it takes up a great deal of time. I may state that I had a case in which a hearing in presence was ordered; it took up several days to hear it, and we had a delay of ten months before we got the opinion of the consulted judges; I cannot speak with perfect precision, but I think I understate it when I say it was fourteen months from the date of the hearing before the case was finally disposed of.

2064. What is the name of that case?—Mackintosh's trustees against Hamilton and his creditors; it was a case of *legitim*.

2065. Mr. Wallace.] Should not a great proportion of the incidental applications to which you have adverted, such as those for the appointment and recall of factors and curators, be made competent in the time of the vacation?—I have known very great inconvenience and loss sustained to the public in those matters, by waiting till the court met; I think, at all events, there should be the power of making interim appointments, if there is any ground for putting off the permanent appointments till session time, which I cannot see any reason for doing.

2066. Do you consider, if the plan proposed by the Law Commissioners were carried into effect, and if the improvements to which you have adverted in hearing and disposing of cases before the lords ordinary and the inner houses were to take place, a very considerable increase in the business of the Court of Session might be anticipated?—I do.

2067. Might not the increase be such as to render it impossible for one court to get through the business?—I do not think there is much likelihood of that. The increase that I would anticipate would chiefly arise from the judgments of inferior courts being brought more frequently under the review of the Court of Session, and in far the greater number of these cases the parties would, as they do at present, rest satisfied with the judgment of the lord ordinary.

2068. Sir W. Rae.] Why should it be desired that more cases should be brought from the inferior courts to the Court of Session?—I think, where a party is dissatisfied with the judgment of an inferior judge, there should be rather facilities

lities given than otherwise for his going to a higher tribunal if he thinks his case is of sufficient importance to warrant that.

2069. What facility would he have hereafter that he has not at present?—There is not at present, I think, the same confidence in the result of an appeal to the Court of Session that there would be if the business was conducted in such a form as I have humbly suggested; of course, my opinion goes only for what it is worth; but I do think, that the delay which takes place before the lords ordinary,—the uncertainty which a party now experiences as to when his case may come on, the impossibility of his being ever informed when he may come up to hear it himself, and the expense—(all these circumstances together)—prevent a great many judgments of the inferior courts being brought under review that would otherwise be brought, and would be brought, I think, with advantage to the public.

2070. You do not think there is any advantage in the parties acquiescing in the judgment of the sheriff?—I think there may be an advantage, but I think that acquiescence may arise from causes which, instead of being advantageous, are disadvantageous. I think, if a party is prevented from bringing his case to the Court of Session from a mere dread of delay and expense, which could be avoided, it would be desirable that the party should have an opportunity of having his case disposed of in the Supreme Court should he wish it.

2071. Your remedy, you think, will secure both against delay and expense?—I do.

2072. *Chairman.*] What proportion of the cases have you known to be brought to the Court of Session from the sheriff-substitute without passing through the hands of the sheriff-depute?—I would say that my impression is, that I never knew of any such cases,—for this reason, that I am sure if a case had been sent to me in that situation, and if the time had not expired, I should send it back to the country with a recommendation that the party should appeal to the sheriff-depute. That may be done without expense.

2073. You consider that it would be the ordinary course of practice, that before the appeal is taken to the lord ordinary, the case should be submitted to the sheriff-depute?—Unquestionably.

2074. *Mr. Wallace.*] Is the practice of sending cases for the consideration of the whole court productive of much delay?—I think it is.

2075. Is it frequently resorted to now?—It has been more frequently done of late, and in order to show the sense of our profession upon that, I may read the following extract from the minutes of a meeting of the Society of Writers to the Signet held on the 6th of February, in which they state, “By reducing the number of judges to 12, it may happen, in those cases in which ‘all the judges are consulted, *of late of frequent occurrence*, that there may be an equality of votes without any law to regulate what may take place in such an event.” I merely read that to show that there is a sense in our profession that the practice is increasing.

2076. *Chairman.*] That document to which you have alluded, emanated from a meeting of the profession to protest against the reduction of the number of the judges?—Yes.

2077. Was that feeling unanimous?—I believe the feeling of those who stayed was unanimous.

2078. There was no division at the meeting?—I understand not; but I was not there at the conclusion of the meeting.

2079. *Mr. Wallace.*] Please to put in the document—[*The Witness delivered in the same.*—*Vide Appendix (G.)*]

2080. Supposing the lords ordinary to be relieved of the preparation of causes, and of all motions connected with it, what saving of time do you think that would effect?—From a table I have made out showing the number of motions called by each of the lords ordinary on the first day he sits in court for the week, it appears that the average number before each lord ordinary is about 100; I may state, that for those 18 first days of the week for each lord ordinary, the number is 1,801, which allows 100 cases a day for the whole; this would be rather too large an average for every day, as there are always more motions on the first day of the week than on any other; I would state the total average per day at 80, being 20 for each lord ordinary; 20 motions, on the average, will occupy about an hour, so that there would be a saving of time to each of the lords ordinary of an hour a day; of course, to some of the lords ordinary, the saving of time would be much greater than to others, indeed more than twice as great; the lords ordinary at present sit 107 days a year, for four or five hours a day, so that the saving would be equivalent to an extension of the session for considerably more than six weeks; six weeks, if four hours a day be taken as the average;—proportionably—

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more if the average time of sitting is stated, as I believe it will be more correctly stated, at five hours.

2081. Do you consider the profession to which you belong, from personal practice in the courts, have their attention more called to the routine and formal matters than gentlemen of the bar?—I believe those agents who personally superintend the conduct of their cases in court, without leaving them, as many who have large businesses do, to clerks, are in general very well informed upon matters of form.

2082. Is the Committee to understand you are of opinion that the profession to which you belong, solicitors and writers to the signet, have their attention more called to mere formal matters than advocates probably have?—Necessarily so.

2083. *Chairman.*] It is the duty of the agent to attend to the technicalities?—Yes, and we are responsible for due attention to them.

2084. *Mr. Wallace.*] Is it not much more likely that you should hear complaints of delay, expense and dissatisfaction than the gentlemen of the bar?—Yes, particularly when these arise from want of counsel, for they do not experience either loss or inconvenience from their absence in cases in which they may have been instructed, but to which they cannot attend from being engaged elsewhere.

2085. But, generally speaking, counsel do not come into contact with clients; is it not the profession to which you belong who must take the consequence of any fault-finding which there may be with the court?—Yes, that is our painful position.

2086. *Mr. Serjeant Jackson.*] You expressed an opinion that dissatisfaction was produced among the suitors in Scotland from having two co-ordinate courts; do you not conceive that there are countervailing advantages arising from that arrangement?—I should have said so *à priori*, but I do not think in experience it has turned out so; one would have supposed that there might have been a certain check, and there is this advantage in two courts,—there is a choice, which we in Scotland are rather fond of.

2087. The suitor has a choice to which of those divisions he will take his cause?—Yes, he has a choice at the outset, both as to the lord ordinary and as to the division.

2088. Would not the defender, if he were prejudiced in his opinion, or in the opinion of his advocate, by the decision of the lord ordinary, have a choice?—No; the pursuer has the exclusive choice, both as to the lord ordinary and as to the inner house.

2089. If the defender is dissatisfied with the decision below, he must go to that division that is chosen by the pursuer?—Yes.

2090. Do not you think that the law of Scotland upon difficult points is likely to be more satisfactorily settled by judicial decision, in consequence of having two divisions of the inner chamber instead of one?—I do not think it has been found so; indeed, my opinion is the other way, from the experience of the last 30 years.

2091. Is the cause of that opinion that they come to different conclusions?—Yes; for instance, when we are bringing a case, we often talk with our counsel as to which of the divisions we shall bring it before, and it is frequently said that you are much safer in the first division, with questions of a particular kind, where they are known to have taken up different views from the judges of the second division; I would say, having some experience in questions of entail, that at one time we considered we had a better chance of breaking an entail in one division than in the other.

2092. But the judges of each of those divisions are conscious that similar questions may come before the other division to those which come before them?—Yes.

2093. With men acting upon the motives that commonly influence mankind, do not you think that that would induce them to be more cautious and deliberate in considering the judgments and the grounds of those judgments, reflecting that similar questions will come under the judgment of able men in another court?—*A priori*, one would think so; but I think in points relating to the mixed mass of human affairs, experience is the only safe guide to take; and as experience has not led to such a result, I would not act upon a mere abstract notion which was found to have been incorrect in the only instance we have had of its practical operation.

2094. Would not difficult questions of law be likely to be more fully investigated by having the minds of two sets of judges applied to those questions from time to time, and examining and sifting the ground upon which judgments ought to be formed?—No doubt the greater the number of minds applied to the discussion

sion of any question, the more likely it would lead to uniformity of opinion in mankind at large; I think, as to all questions, the more they are investigated the more probable it is that we shall come to the truth; but I do not understand that the question relates to the mere number of judges who are to give their opinions upon the cases that come before them, but to the circumstance of there being two courts; now as those courts are co-ordinate, and their judgments, when they may be conflicting, do not come into collision so as to prevent their being carried into effect in any way, I think that there has been no such collision of one division with the other as to have created any advantage in point of uniformity.

2095. You are aware that the proceedings before each of those divisions are reported, and the judges of the one division have an opportunity of seeing what has passed before the judges of the other division?—No doubt.

2096. Is not that a great advantage?—I would say that where the course of decision in any particular class of cases has been one way in one division and another way in the other, the judges are not apt to give up their respective opinions, but that they generally wait till a decision shall have taken place in the House of Lords to see which of the opinions is there held to be the sound one.

2097. Has there been no instance of the judges of one division conforming their decisions to the opinions of the other?—There is no case that I know of, of the judges of one division having changed their opinions merely because the judges of the other division held different opinions from them.

2098. Is it usual for the Scotch bar to quote in one division the decisions of the other division?—Yes.

2099. Are they not received with respect by the judges?—Yes; but I still say that the judgment of one division as to a particular class of cases (unless there should be an identical case), would not necessarily lead to the judges of the other division changing their general view of the law as applicable to the class.

2100. It is difficult to get cases identical; but there will be classes of cases governed by the same principle; would not candid men, presiding in those co-ordinate courts, naturally be influenced by the opinions of their brethren?—As a matter of course they naturally would, to a considerable extent, be influenced by a previous judgment of the other division in a case involving the same principle which arose for discussion in the cause before them.

2101. I have not understood you as impugning the conduct or disparaging the judges in either division with regard to probity and candour?—I should be sorry to do so.

2102. That being the case, do not you see that there is a great public advantage in having those two bodies of judges applying their minds from time to time in deciding analogous cases, each borrowing from the other tribunal materials for mature deliberation in the discussion and examination of principles of law?—I repeat that I do not think that result has taken place in practice.

2103. Do not you see that there must be a great public advantage in that?—I think the result has been disadvantageous to the public, because we do find in practice that there have been conflicting decisions.

2104. But still are there not great compensating advantages in settling the law on important points?—If we had 10 different courts, so far from its being an advantage that 10 different sets of judges should be applying their minds to the various classes of cases that arise, it would produce evil rather than good; because, upon the whole, questions of law are not matters that minds of equal power always take the same view of; and in questions the most essential, one court may come to one conclusion, and another court to another, upon the same facts; and it is a great advantage that we should have an uniformity in the law, even when the original principle of decision may have been unsound.

2105. *Chairman.*] You put an extreme case when you put the case of 10 courts; if you confine yourself to the present state of things, which cannot be altered but by Act of Parliament, do you not consider it preferable to one division only existing?—Extreme cases have been put to me, and I am anxious not to give an abstract opinion which is contradicted by my own experience.

2106. *Sir W. Rae.*] When the divisions do differ, do they meet together and have a joint consultation so as to prevent collision?—That is the object, I presume, of having those hearings in presence, and of questions being sent from one division to the other; the object in view is to prevent conflicting decisions; and I think that it is one of the disadvantages of having two courts that we are obliged to resort to that course; it takes up a great deal of time, and I do not think that having the conflicting opinions of 13 judges, as we often find to be the result, leads

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to any greater uniformity or confidence on the part of the public than if we had a decision by only five judges; the judges are generally the greatest lawyers of their time, and if we have three out of five judges with well-sifted opinions, I do think it is less satisfactory than if we have 13 judges divided 7 to 6.

2107. Dr. *Lushington*.] Do not you think, when the case has been so referred, and the opinion of the consulted judges taken, and it comes under the consideration of the House of Lords, that the House of Lords derive considerable advantage from examining all those different opinions?—Most certainly; but if you look at all the cases where opinions have been given, you will find, I think, that there has not been a greater number of separate opinions given at length than if each of five judges were to give his opinion separately; generally one judge states that he coincides with certain others.

2108. What do you say to the Auchterarder case?—That was a case *sui generis*, involving constitutional questions of great national importance.

2109. But there have been upon entail questions opinions of consulted judges, nearly every one of them of considerable length?—Cases have been very rare in which there were not two or three judges who subscribed opinion.

2110. Mr. Serjeant *Jackson*.] Does it ever happen in any case that the judges who compose the two divisions of the inner chamber sit together upon any questions?—When they have a hearing in presence, not only do the judges of the two chambers sit together, but the lords ordinary with them; the whole 13.

2111. Is that of their own mere motion, feeling the case to be of great importance and difficulty, or is it at the choice of the parties?—Not at all at the choice of the parties, but entirely of their own motion; if any one judge suggests it, I believe it is generally ordered.

2112. And those are cases of rare occurrence and difficulty?—Yes.

2113. Mr. *Wallace*.] Are not the 13 judges assembled upon an order of remit from the House of Lords?—Yes.

2114. Mr. Serjeant *Jackson*.] What do you call a court so formed?—It is called a hearing in presence, that is, *in presentia dominorum*.

2115. Is it not a distinct court?—No.

2116. Sir *C. Grey*.] Does the practice exist of referring points of law to the whole of the judges, entirely separated from fact, as they do frequently in the English courts, to the Exchequer Chamber or the 12 judges, or is it a reference of the whole cause?—We have no such mode of dealing with cases as to send a question of law; if the judges send to ask a special question, the whole papers are sent.

2117. Do not you think it would tend to get a settlement of the law, which would be binding, if that practice did exist of taking the opinions of the whole 13 upon some abstract points of law?—If it could be done in the form of abstract points of law, I think it would.

2118. Mr. Serjeant *Jackson*.] I collected, in the early part of your evidence, that you represent the public as objecting to the outer chamber that there was delay, and to the inner chamber that there was hurrying?—"Hurried and unsatisfactory," were the terms I used in reference to the proceedings of the inner house; and, in respect to the outer house, my words were, "great delay and confusion."

2119. What does the confusion arise from?—The confusion arises partly from this, that the hearing of debates is so much mixed up with the hearing of motions, in the course of preparing cases; on the same days that a lord ordinary comes out to hear debates, he takes up what we call motions, being applications in the course of the preparation of causes,—for diligences, for papers, for reponing a party against decree in absence, &c.

2120. Does he not decide each of those questions as they come before him?—Exactly so; but from the manner in which counsel are taken up in the inner house, it frequently happens that we do not get forward our counsel when those motions ought to be heard, and we come back upon them at the end of the motion-roll; that takes up a great deal of time.

2121. What is the confusion?—I explained that, by reading from the Report of the Law Commissioners, the testimony of one of our most eminent counsel, Mr. Graham Bell. When a debate comes on, we may have our junior counsel present; they both are heard in the absence of the senior; when the senior comes, not having heard the speech of the junior counsel, he does not know how to deal with the matter, and goes over the whole case more fully than he need do. Then it may happen that a case is partially heard, a counsel may be half heard one day upon a case when he is called away; a new case is taken up,—that may be half heard,—then the next day, or two days afterwards, we shall have the other half of the counsel's speech in the one case, and the other half of his speech in the other.

2122. You



2122. You think the cases run into each other, and produce confusion?—Yes.

2123. Do you think that embarrasses the judges?—I do not know that it does; but it is a great inconvenience to the parties and to the agents; you do not know when your cases will come on.

2124. Sir *C. Grey*.] Do you know any objection which applies permanently to the two divisions of the inner house, which would not apply with greater force against the courts of co-ordinate jurisdiction in Westminster?—It is impossible for me to answer that question, from my perfect ignorance of the mode of conducting business in Westminster Hall; I cannot compare the two together; I have not the knowledge necessary.

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MEMBERS PRESENT:

The Lord Advocate.  
Dr. Lushington.  
Mr. Wallace.  
Mr. Ewart.

Mr. Serjeant Jackson.  
Sir Robert Harry Inglis.  
Dr. Stock.

THE HON. FOX MAULE IN THE CHAIR.

Mr. *William Miller* called in; and Examined.

2125. *Chairman*.] I BELIEVE you are a solicitor before the Supreme Courts?—I am.

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2126. How long have you practised as a solicitor before the Supreme Courts?—I was appointed a solicitor in 1822, but I had charge of an extensive business for five years previously.

2127. Then the Committee are to understand that since 1817 you have been thoroughly acquainted with the business before the Supreme Courts?—I think so.

2128. Of course you are acquainted with the mode of preparation and disposal of causes before those courts?—I am.

2129. From your practice, is it your opinion that in the outer house there is sufficient business to command the constant attention of five judges?—I think so.

2130. Is there sufficient business in the inner house to require the attention of two divisions?—I do not think so.

2131. Will you state any reasons for thinking that there is not sufficient business in the inner house for two divisions?—A considerable portion of the time of the inner house is taken up with routine and formal business, which I think they might be advantageously relieved of. The judges sit in court only about two hours, on an average; while I think they might with propriety sit for five or six hours, which would be nearly three times the period of their present sittings, even including their routine business.

2132. But suppose that they are not relieved of this routine and formal business, is it your opinion that, taking the business as it is at present, and supposing the sittings to be prolonged, as you suggest, to five or six hours, there might not be sufficient business coming from the outer house to require the attention of two divisions of the court?—I think one court would still be competent to do the business in the manner in which it is done at present, and to bestow more attention upon it than is now done.

2133. Suppose that your proposition were carried out, of having one court to do the business; of how many judges would you make that court to consist?—Of four; I think the present number is the best that can be adopted.

2134. Supposing you had only one court in the inner house, composed of four judges, might it not so happen, without drawing a very extreme case, that the judges might be reduced to two in number; that a judge might be ill or absent from some cause, and that another judge might be interested in the case which was brought before that single court?—Such cases have happened, in point of fact, and in that case a lord ordinary has been called in to hear the cause; I recollect an instance in which that occurred during the last session; but we were in a peculiar situation last session, for there was only a quorum of judges in the second division, owing to the illness of Lord Glenlee, in the first instance, and the want of an appointment after he had resigned; I recollect a lord ordinary being called in under such circumstances to make up the quorum.

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2135. From another judge being absent, on account of his being interested in the cause?—Yes.

2136. Mr. Serjeant *Jackson*.] Is it not the law of Scotland that judges cannot preside in deciding cases, where they stand in certain degrees of relationship to either of the parties?—I understand they are not competent to sit as judges where they would not be competent as witnesses in the cause, on account of relationship.

2137. Are you competent to tell the Committee what those degrees of relationship are?—I cannot remember them at this moment.

2138. Are the degrees of relationship very extensive?—No.

2139. Do you believe that the judges are disqualified from deciding causes where they stand in the relationship of father and son, or uncle and nephew?—I do.

2140. Dr. *Stock*.] Have you ever known an instance of the challenge of a judge?—I have not, but I recollect an instance of a judge not sitting in such circumstances; I do not remember of the challenge being taken, but I have little doubt that either the judge declined or that the challenge was taken.

2141. Dr. *Lushington*.] You have known instances of judges withdrawing voluntarily because of such relationship?—The case I refer to was where the judge had an interest in the cause, which disqualifies as well as relationship.

2142. The *Lord Advocate*.] Lord Glenlee declined to sit in a case in which his son was interested, *Miller v. Miller*?—Yes.

2143. *Chairman*.] With those chances of such reductions occurring in the court, is it still your opinion that it would be well to trust to one court of review, consisting of only four judges?—I certainly would do so; that is my deliberate opinion; the case referred to very seldom occurs.

2144. And you state that on such an emergency you would call in a lord ordinary?—Yes.

2145. But you before stated that you consider the lords ordinary are fully employed in their own business?—Yes; but they could take extra labour occasionally.

2146. Would that not be an interruption of the business of the outer house?—As long as it occupied, it would.

2147. Do you think it would be wise or prudent so to reduce the number of judges, as to suspend in any way the administration of justice to the public?—I do not think it would amount to the suspension of justice in any way; it occasionally happens that a judge is called in in the way I have mentioned, but it is not very often, nor is it very long that they are detained, and you will observe that there is a vacant day in the week on which such judges could be called into court without interrupting the business; the lords ordinary sit only four days a week, whilst the inner houses sit five.

2148. But suppose one of the judges of this single tribunal, which you would erect in the inner house, was absent from illness which might reasonably occur, you would then have a quorum of three sitting in this single tribunal; do you think that would be a proper quorum to sit for any continued time?—We have not had a court sitting in that situation for many years, so much as lately, and I have already stated that I think four a much more desirable number for a court.

2149. But in reference to what has happened lately, considering that there are two courts, it is not likely you would have only three judges in each court at the same time, and therefore there would always be one court of review to which the party might go, with the advantage of having four judges to decide upon his case; but if you reduced the two courts to one, the smallest illness in one judge reduces the court of review to three judges; and supposing two to give a decision contrary to the decision of the lord ordinary in the outer house, and the other to agree with the lord ordinary, would not that leave the case of litigants very much open to further proceedings in appeals to the House of Lords?—When the lord ordinary pronounces judgment it is not in the option of the party to make his selection between the two courts; his election is made at the commencement of the cause, and what you suppose may occur in its progress appears to me more an argument to increase the number of judges in the one division than to support the necessity or expediency of two courts.

2150. Then, notwithstanding the cases which I have put to you, you are still of opinion that there should be but one court of review in the inner house, and that that court of review should consist of four judges?—I am.

2151. And that that would be the most expedient way of administering justice with due and proper speed to the public?—I think so.

2152. Mr.

2152. Mr. *Wallace*.] Are you aware that during the last year one of the courts had only three judges in it for a considerable time, in consequence of the illness of the Lord Justice Clerk?—Not last session, but the session before.

2153. The winter session of 1838-9?—Yes.

2154. Did you hear of any confusion or delay in the business in consequence of the absence of the Lord Justice Clerk?—I am not aware of any interruption to the business.

2155. Was it complained of as being likely in any way to create confusion in the business of the court?—We were aware that the Lord Justice Clerk was absent from indisposition, and that he could not help it; and therefore I am not aware of complaint having been made of his absence.

2156. And so far as you know there was no practical evil arose from the absence of that judge?—I am not prepared to say that; I think it was desirable that the Lord Justice Clerk should be present.

2157. The *Lord Advocate*.] It is desirable that the court should sit in its full number?—Yes; but I am not aware of any interruption to the business on account of his absence.

2158. Dr. *Lushington*.] Do not you think his presence in adjudicating the causes would have added weight and authority to the decisions of the court?—I have no doubt of it, and that his presence was desirable.

2159. Mr. *Wallace*.] During the same session are you aware that another distinguished member, Lord Corehouse, was removed from the other division of the court by severe affliction?—Yes, I am.

2160. Did you hear of any evil consequences to the progress of the business of the court to which that judge belonged in consequence of his absence from illness?—Lord Corehouse was a very eminent lawyer, and his presence in that court was very desirable; and I have no doubt that his absence would be felt on that account.

2161. Do you now allude to the usefulness of his presence as a judge, or to the interruption of business from his absence?—I allude to the weight of his opinion, and his judgment in the disposal of causes when they were advised.

2162. The Committee are to understand, that the loss of so distinguished a judge was, no doubt, regretted by the profession?—I have no doubt of that.

2163. In recommending, as you have done, one chamber only, would you propose to extend the period of the daily sittings of the inner chamber of the Court of Session?—Certainly, it would be necessary to prolong them; both because the court would have double the business, and because it would be proper, in my opinion, that they should hear causes at greater length than they do at present.

2164. The *Lord Advocate*.] That the *vivâ voce* hearings should be at greater length than they are at present?—Exactly.

2165. Mr. *Wallace*.] Have you formed any opinion of what time it would require daily to perform the duties of one division, which are now performed by two?—I think that five or six hours would be sufficient; from ten to four.

2166. It has been stated in evidence to be the practice of the judges presiding in the inner houses, to cause only one or two cases to be set down for trial daily; would you propose to increase the number of causes on the roll, provided there were one division only?—There have generally been put out two prepared causes by each division for judgment, and of course it would be necessary to double the number.

2167. Do you mean the Committee to understand, that there should be causes set down sufficient in number to occupy the court during the time you have specified to do the business?—I think so; it would be necessary to put down a sufficient number of causes on the paper, that the court might be enabled to go on in case of any particular cause being postponed in consequence of arrangements between the parties, so that the time of the court might not be lost.

2168. Is the Committee to consider that the court sitting for five or six hours daily, would allow time to the judges to read the papers and consult the authorities respecting the causes coming before them?—I think it would.

2169. Is your opinion in that respect supported by any testimony or evidence?—The Law Commission reported, that in their opinion it would be desirable that the judges should not read their papers till after the hearing; and I think that is a very proper recommendation.

2170. Can you recollect in what part of the report that opinion is to be found?—The First Report, page 39.

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2171. *Dr. Lushington.*] Do you think it advisable that the judges should not read the papers at all before they go into court?—I think it very desirable that they should not read the records; they are the bare bones of the case, and are accompanied generally with an argumentative note on the part of the lord ordinary, which gives a one-sided view of it.

2172. When you say they are the bare bones of the case, what do you consider to be the flesh and blood of the case?—The argument and legal authority.

2173. Do not the record and the note of the lord ordinary give that degree of information to the judge who reads them, that enables him to come into court and understand the arguments of counsel with greater facility?—At the same time that it may do that, I think it is calculated to bias his opinion.

2174. Do you conceive that the judge may be master of the case and the law, as stated in one of the Scotch records, without making up his mind as to the ultimate result till he has heard counsel?—I can conceive that possible, but I do not think that is generally the case in practice.

2175. So that, in order to make the judge decide with perfect fairness and impartiality upon the question, you deem it necessary that he should be in a state of ignorance before he hears counsel?—I think it is very desirable that he should come with an unbiassed mind; not in a state of ignorance. There are cases in which the parties state their case in printed papers at length, and in all such cases the court have ample information before them upon which to decide the cause; and on such occasions, I think, the counsel are very unwilling to trouble the court with observations at all; but in the other case, I think it fair and desirable that the court should hear the counsel before they read the record.

2176. Where there is no “case,” as it is termed in Scotland, you think it desirable that the judges should hear counsel before perusing the record?—Yes.

2177. Do not you merely mean this, that a judge ought to come into court with an unbiassed mind as to the ultimate decision?—Yes.

2178. And provided he is ready to listen and attend to the views and arguments of counsel, are you not then of opinion that the greater the knowledge he has of the case the better?—Undoubtedly.

2179. *Mr. Wallace.*] Does it consist with your knowledge practically, that considerable and general dissatisfaction with the mode of administering justice in the Court of Session exists?—It does; there is a great want of confidence in the inner house generally.

2180. Is it chiefly with the inner-house decisions that the dissatisfaction exists?—Chiefly; there are great arrears before some of the lords ordinary, but there is great satisfaction with their judgments when obtained.

2181. *The Lord Advocate.*] And with the mode in which they hear cases?—Yes; at the same time I wish to state that there is great dissatisfaction, and some cause for it, in my opinion, in the delays and obstructions which take place in the preparation and hearing of causes before the lords ordinary; it has increased very much of late years.

2182. *Mr. Wallace.*] Do you mean to represent to the Committee that the judges in the outer house possess entirely the confidence of the profession, but not so the mode in which they do the duties?—I would say, that the public and the profession have every confidence in those of them who are in arrear.

2183. Does it depend upon those judges, or is the extent of arrear to which you allude beyond their control?—I do not think it is their fault; I have seen a lord ordinary, with 10 causes and upwards on the paper, call them, without being able to find counsel to attend him. Sometimes in one cause the counsel were engaged; in another the debate was commenced and broken off by the counsel being called to the inner house; and I have seen the judge in that manner go through the whole roll without being able to find counsel to attend him, and after waiting for some time adjourn the court in despair of procuring counsel.

2184. Do you mean, that in this way the court is obliged to rise in consequence of the interruption it receives from the absence of counsel?—I have seen that happen repeatedly with the lords ordinary, and I have seen a cause begun to be debated, and the debate not concluded for weeks afterwards. On that subject I will beg leave to lay before the Committee the opinion of Mr. George Graham Bell, an eminent junior counsel, given before the Law Commission: “The great delay of business which at present prevails in the outer house certainly demands most serious

serious consideration ; indeed, the grievances arising from this have now become so great, that every person engaged in the practice of the outer house must, I conceive, be satisfied that some change ought to be tried ; at the same time, considerable reflection on the subject renders it to my mind more and more difficult to devise any plan likely to lead to a material practical improvement. The following changes have sometimes occurred to me, but I place little reliance on the practical effects, and wish them to be viewed as mere hints, on which my opinion is by no means matured : 1st. To take from the lords ordinary all the motions which are not to be opposed, and transfer these to the clerks ; a considerable portion of each lord ordinary's time every day is occupied with little more than the mere calling over of the causes, and I see nothing to prevent a new arrangement so as to devolve mere motions not requiring discussion to the clerk." "3d. To make some arrangement so as to prevent the lords ordinary and both divisions sitting at the same time. The main cause of delay is the withdrawing of counsel, which not only stops debates, wastes time in passing from one cause to another, but necessarily creates repetition in pleading, the causes being often heard piecemeal, at the distance of two days, or even weeks. On this head it has been suggested to make the divisions meet on different days, and at an earlier hour, and I think this might be proper and beneficial. 4th. To shorten, if possible, the speeches and discussions in the outer house. One great cause of the present lengthened debates no doubt arises from the manner in which cases are heard, partly at one time and partly at another. The junior, uncertain if the senior will be heard at all, is tempted or called upon to make a much longer statement than belongs to an opening speech ; and the senior, again, either from not having heard the junior's opening, or afraid that the judge may, from the delay in the debate, have forgotten the debate, is induced to re-state it at full length. Any arrangement whereby a continuous hearing of the cases could be secured would certainly shorten these oral discussions, and perhaps not a little might be done by a sort of tacit convention amongst the counsel for abridging as far as possible their speeches."

2185. Do you entertain the same opinions as those which you have now read from Mr. Bell's evidence ?—I agree with his testimony to the facts ; there is the testimony of another witness, an eminent solicitor given before the same Commission.

2186. Who is that ?—Mr. Daniel Fisher.

2187. Was he in extensive practice ?—He was ; and he gives testimony to the same effect ; "One great defect in the present system, and which is much and justly complained of, is delay ; in the outer house this delay arises from various causes : 1st, in the preparation of the case, prior to closing the record, occasioned by the numerous divisions of the condescendence and answers which so generally occur. 2d. After the record is closed, great delay frequently arises from the great arrear of cases standing in the debate rolls of some of the ordinaries ; so much so, that I have had occasion to enrol in a lord ordinary's hand-roll of motions a cause standing in his roll of debates for the mere purpose of taking some order to prevent the process falling asleep by the lapse of year and day. And, lastly, great delay is caused by the difficulty or rather impossibility of procuring the attendance of counsel when the cause is at length called in the debate roll. It would thus appear that the preparation of causes in the outer house, and the hearing of debates, is a great deal too much for the same judge. An ordinary has a long roll of motions to dispose of which every day interferes with his regular debates, and to call this roll of motions, his lordship is usually obliged to stop in the middle of a debate ; the consequence is, that the counsel, who would otherwise have gone on and finished the debate, are carried away and fixed at other bars, and when the roll of motions is finished, the same counsel cannot be got ; another cause must be commenced, which in its turn is also interrupted ; these half-heard debates are never satisfactory, and much time is wasted by counsel being under the necessity of resuming, that is going over again, a great part of what has been said a day or even a week before ; it is no uncommon thing for an ordinary to call over his whole roll of debates without being able to procure the attendance of all the counsel in any one cause, and so he is under the necessity of leaving the court after disposing of his motions at a comparatively early hour of the day. In the inner house the delay and interruption of business caused by the difficulty of procuring counsel is much greater ; the two divisions of the court at present sit at the same time, and thus causes come on for decision in each, in which one or more of the same counsel are employed.

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employed. Either the assistance of such counsel is lost to the party, or the court have to wait till the counsel is disengaged from the other division, and the regularity of the proceedings is thereby broken in upon, cases are frequently delayed over the day, and parties coming from a distance to be present at the advising of their cause, are detained in town to their great inconvenience as well as expense."

2188. The *Lord Advocate*.] Do you concur in those statements?—I do.

2189. You refer to them as in fact expressing your own opinions?—Yes.

2190. Do you think the circumstances that are there mentioned as requiring remedy still exist and continue to operate?—Certainly, they are growing worse every day, in my opinion.

2191. Mr. *Wallace*.] You have stated that there are considerable arrears of business before the lords ordinary; can you state how it happens that those arrears exist?—My opinion is that it arises from the mode in which the causes are pleaded; six tribunals sitting all at one time, it is impossible to supply the bar of each tribunal; we have very few counsel; it is not like the English bar.

2192. Mr. *Serjeant Jackson*.] Have you not a supply of counsel adequate to the demand; there is no lack, is there, of gentlemen of education and ability at the Scotch bar?—Our well-employed counsel are very few, though the list of the bar is very numerous.

2193. Will there not be drawn forth from the body of the bar, generally, into the ranks of the fully employed bar, an adequate supply to meet the demand?—The selection of proper counsel is now a very important matter; formerly the business of the bar was much more diffused than it is now; if we employed an inexperienced counsel we could rectify at a subsequent stage any deficiency that might have occurred in the original pleading; but now, the judgment of the lord ordinary is final and conclusive, so far as he is concerned, and we cannot rectify it afterwards, except by review of the inner house. In fact, the judgment of the lord ordinary is the most important stage in the cause, and I do not conceive that any solicitor would consider himself warranted in employing an inexperienced counsel in a cause of importance.

2194. Then I conclude that the quantity of business that is to be transacted in the courts of Scotland is not sufficient to employ fully a larger number of barristers than are now to be found in full practice?—Exactly so; and in consequence of so many tribunals sitting at one time we cannot supply so many bars.

2195. The *Lord Advocate*.] If there were the means of employing more counsel, you have no doubt that those could be got out of the educated young gentlemen of Scotland; that is a demand which would ensure its own supply, is it not?—Yes.

2196. There are young gentlemen in Scotland to supply that demand, if it existed to such an extent as to require it, and with such remuneration as to draw them from the country?—Yes.

2197. Mr. *Serjeant Jackson*.] Would it not be a public mischief, and lower the standard of talent and eminence at the Scotch bar, if you were to confine the counsel to particular courts; if that plan were adopted could there be sufficient employment to remunerate men of talent?—We should have the same quantity of business under an improved system that there is now; I think there would be an increase of it; I do not see therefore that the reduction of the court would operate to the disadvantage of counsel.

2198. But I am speaking of confining barristers to particular courts?—I do not see how it is practicable by legislative means to confine counsel to particular courts; but if the number of tribunals sitting at one time were lessened, their attention would not be divided and distracted as it is now, and causes would be heard continuously and disposed of without delay. I have no doubt of this, that the counsel frequently prepare to debate a cause, and are not heard out for weeks afterwards, so that all those debates before the lords ordinary become an excessive labour to our counsel.

2199. Is this one of the many circumstances which leads you to desire a reduction in the number of tribunals in Scotland?—The principal circumstance that induces me to form that opinion is the difficulty of procuring counsel.

2200. You think then that there are advantages arising from the present number of tribunals, but there are counterbalancing disadvantages which weigh in your mind?—I am not aware of the advantage of two courts; we have a greater chance of

of getting first-rate judges for one court than for two courts, and it would be of much greater importance that we should have four men of eminence in that one court than have men of inferior talent in the two courts.

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2201. When you speak of two courts you mean the two divisions of the inner chamber?—Yes.

2202. You are not aware of any advantage arising from having two divisions in the inner chamber?—The suitor might think it an advantage that he was able to choose a court whose views were more favourable to his suit and claims; but I am not aware of any advantage that it would be to the public generally and to the law.

2203. Do not you think the existence of two co-ordinate courts at the same time, with judges of ability in each, confers an advantage upon each reciprocally?—I think it is apt to make conflicting judgments; it has been found so in practice.

2204. Does that not lead to a more deliberate canvassing of the judgments?—I think that would be better done by the court of ultimate resort.

2205. Must not those courts act upon each other; would there not naturally be an emulation between the two courts, each to preserve the high character of the court, as compared with the other court?—I have not seen the advantage in that respect.

2206. It appears in evidence that the decisions of the court are reported, and that what is decided in one is quoted in the other?—Yes.

2207. Has not each court a double advantage, arising from the ability and research which may be exercised by the other court as well as by its own members?—No doubt in a particular case that may occur.

2208. Is not that a great advantage?—One court would have the same advantage, and in a greater degree, in adjudicating a greater number of causes; they would obtain more experience and acquaintance with the law in consequence of their hearing a greater number of causes.

2209. Do you think there would be an equal amount of investigation and research arising from the labours of four judges as from the labours of eight?—We look chiefly to the bar for research in the investigation of causes.

2210. Do not you think that it is the bounden duty of the judges to follow up all hints they may receive from the bar, and all aids and assistance they may obtain from the bar in their own study at home?—Certainly.

2211. That being so, does it not inevitably follow that there is a much greater advantage to the public in having the benefit of the investigation and research of eight able men sitting in two tribunals than of four able men sitting in one tribunal?—I have not seen that; and I think, if we had four able and talented men sitting in one court, it would be more likely to produce uniformity of decision than two courts, which often form conflicting opinions; and the more judges you have the more you multiply the chances of diversity of opinion.

2212. Do not you think that that very circumstance of diversity of opinion and different views taken by different leading men on the same subject-matter is in itself calculated to produce a more careful investigation of the principles of law, and a sounder decision upon them in important questions?—It may do so certainly.

2213. Mr. Wallace.] After the various ways in which this subject has been placed before you, do you adhere still to the opinion you first expressed in favour of one court of review in place of two?—I do. I do not see how counsel are to be supplied to the different bars in any other way than by reducing the number of tribunals.

2214. Is it owing to the practice in the outer house of breaking off debates as counsel may be called away that you chiefly complain of delay and interruptions in those courts?—Yes.

2215. And if any plan could be suggested and adopted to do away with those interruptions it would be highly beneficial in the administration of justice?—I have no doubt of it.

2216. Can you state what has been the progress of some of the lords ordinary who have been most employed during the last session?—Lord Moncrieff has not disposed of one case in two days, and Lord Jeffrey has not disposed of above one and a half in two days, or three in four days.



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2217. Do you attribute this to any want of industry or talent in the judges, or to the system which prevents them getting forward with their business?—I would say that they are very exemplary for their patience and desire to do justice between the parties, and I attribute it wholly to the want of counsel to debate the cause.

2218. Are not Lords Moncrieff and Jeffrey very highly esteemed in every respect as eminent judges?—They are.

2219. And they devote their time and talents to the business of their courts? They do.

2220. You have stated one great evil to arise from an insufficient number of counsel to attend the different bars; will you state what number you believe there is of well-employed counsel?—Of well-employed counsel there will not be more than from 20 to 30.

2221. Do you understand the term practically, "leading counsel"?—Yes, I do.

2222. Do you include the leading counsel in the number you have stated of 20 to 30?—I do.

2223. Can you state how many leading counsel there are?—In the absence of my Lord Advocate we have only four.

2224. I find that the Dean of Faculty, in his examination before the Law Commission, page 27 in the Appendix to the Second Report, says as follows: "We hear a good many complaints at present as to business being interrupted by counsel being engaged in other cases; the system has gone on in the same way since 1808; no complaints were then made, and I do not know why the present judges should not accommodate themselves to the necessity of the case, as formerly; the difficulty occurred then as much as now, and I cannot suggest any arrangement here; the judges should just accommodate themselves to the necessity of the case." This was the opinion given by the Dean of Faculty; does this statement consist with your knowledge?—I do not think it is a correct statement; previous to 1825 the business was much more diffused than it is now, and I never heard complaints of lords ordinary getting into arrear for want of counsel; if we enrolled a cause to-day, it came out in due course generally; it is of late years that this complaint has arisen, and it has arisen from the concentration of the business of the bar, from the cause I have mentioned; formerly we were enabled to rectify at subsequent stages anything that went wrong at the commencement; but the judge now is not able to review his judgment, so that we are obliged to take the best assistance we can obtain at the bar.

2225. Does the answer you have now given show that, since 1825, in consequence of the altered practice, a monopoly has been obtained by the few leading counsel to get a great part of the business in all the courts?—It is only the monopoly of experience and talents, because young men rise up to fill the place of those who are promoted or taken off the stage.

2226. Does the same difficulty arise in finding counsel for the inner houses as for the outer houses?—Not to the same extent, because they are co-ordinate; the one is not entitled to take away the counsel employed before the other; but cases are occasionally postponed from the want of senior counsel, or the case goes on in his absence, and then the party suffers disadvantage, and complains.

2227. It appears, from returns made to Parliament, that the inner houses occasionally, if not frequently, really rise in consequence of counsel not being present; does that consist with your knowledge?—I am not prepared to speak upon that point; I know it has happened before the lords ordinary frequently; I have seen it myself that a lord ordinary, after sitting a considerable time without being able to procure counsel, was obliged to go away at an early hour in the day without procuring counsel; but I am not able to state that I have seen that occur in the inner house.

2228. Have you any remedy to propose for the inconvenience you have stated with respect to the outer houses?—The Law Commission, in their Report, state, that it has been suggested from quarters entitled to the highest respect, that the judges should be confined to their proper judicial functions; but they state that, in their opinion, the clerks of court would not have the requisite authority to enable them to dispose of the routine business, and that there would be a wrangling and an appeal from the clerk to the lord ordinary, which would be as bad as the lord ordinary hearing the original motion; now I agree with the suggestion; while I think there is a great deal of force in the objection; I would propose that the

the junior lord ordinary should prepare the causes and dispose of the routine business.

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2229. Have you any other suggestion to make with regard to the removal of these inconveniences?—If that was not approved of, the judges could dispose of the routine business at chambers, and not order cases to the roll, except where they wished counsel to be heard upon matters of difficulty.

2230. Do you think that such chamber practice would be burdensome to the judges?—I do not think it, because, for one thing, a great part of the time of the lord ordinary occupied in court is consumed in waiting for counsel to be brought up to the bar; that would be all saved; but my opinion is, that the agents among themselves would arrange a great part of the business, and not make it necessary to trouble the lord ordinary except in comparatively few cases.

2231. You have stated one reason why you think one judge to superintend the preparation of causes would be advantageous; have you any other reason to state?—I think the appointment of a single judge to superintend the preparation of causes would secure a greater uniformity and correctness in the preparation of causes, of which a great many complaints have been made lately.

2232. In any case, is it your opinion that it would be desirable that some means should be devised for relieving the lords ordinary of the formal and routine business, and for strictly confining them to what may be called judicial business?—I think it is very desirable.

2233. Were that done, and were some mode arrived at of having their bars supplied with counsel, so as not to allow the interruptions you have spoken to, would they be enabled to do considerably more business daily?—They would dispose of more cases, undoubtedly, if they were heard continuously; I have no idea that they could ever allow such arrears to take place as have occurred.

2234. Do your clients complain very much of being charged with fees for counsel who never appear in their cases?—Sometimes; clients at a distance do not always know that; but there are great complaints made.

2235. From whom do the complaints arise?—Practitioners complain that they are not enabled to get the services of counsel after having instructed them.

2236. Can you state to the Committee whether there are many causes finally decided at present by the lords ordinary?—I should think upwards of one-half the causes heard by the lords ordinary are finally decided by them; and the proportion is, I should say, increasing.

2237. Are you aware how many causes are generally decided in the Sheriff Courts of Scotland?—On an average of five years there were upwards of 13,000 causes per annum instituted before the Sheriff Courts, of which nearly 6,000 per annum were litigated.

2238. You have stated that you consider a considerable proportion of the time of the inner house to be occupied with what you call formal and routine business; can you state what period daily is so occupied?—It is more on some days and less on others; I should say from half an hour to an hour daily; towards the end of the session it increases very much, so as to exclude other business.

2239. Are you of opinion that counsel have the same opportunity of observing the interruptions and the routine business which you have spoken to as the gentlemen of your profession?—The senior counsel have not; the juniors must see it, but they cannot feel it in the same way that the agents do; we feel it a very grievous and serious annoyance in our practice.

2240. You have been asked as to the duty of the judges in reading their papers; do you understand that it is expected by the profession that the judges shall read the whole of the printed papers which are laid before them?—The records are generally accompanied with appendices of documents, correspondence, and otherwise, and we do not expect that they shall read those appendices, but consult them for reference.

2241. Can you state whether, in your belief, the business of the court has increased or decreased of late years?—It has been decreasing.

2242. To what causes do you attribute the decrease?—There has been an improved administration in the local courts, and an extension of the jurisdiction of the local courts; and I would attribute it greatly to the uncertainty, expense and delay which occur in the Court of Session.

2243. Dr. Stock.] What is the nature of the increased jurisdiction you speak of in the local courts?—In Scotland we have upwards of 80 courts of record, all of them competent to try causes to the largest amount; and there have been

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classes of cases transferred to those courts; for example, maritime causes have been transferred from the Court of Admiralty by Act of Parliament; and there have been several other extensions of their jurisdiction.

2244. *The Lord Advocate.*] The sheriff is not competent to decide all causes of action?—No.

2245. *Dr. Lushington.*] Not feudal questions?—No, not questions touching the titles to real property, or consistorial questions, except aliment.

2246. *Dr. Stock.*] Has this increase of the jurisdiction added very much to the amount for which the sheriffs are qualified to proceed?—Not much to each court.

2247. It has added the Admiralty jurisdiction?—It has added the Admiralty jurisdiction; sheriffs are now entitled to suspend their own decrees, and to judge in cases of sessio bororum, aliment and sequestration; sequestration is a large class, and maritime questions are a large class in all the maritime counties.

2248. *Mr. Wallace.*] You have spoken of the dissatisfaction with regard to the courts; has that been of long duration?—For a number of years.

2249. Do you consider it abating or increasing?—It is increasing.

2250. Do your employers in the large towns express their dissatisfaction with the proceedings of the Courts of Session in their correspondence with you?—They frequently complain to me.

2251. In what towns are your correspondents?—My principal correspondence is with the town of Dundee.

2252. Any other large towns?—Glasgow, Perth, Forfar.

2253. It has been stated here and elsewhere, that we as a nation are from habit fond of litigation; do you find that to be the case with your employers?—I find a great apprehension of litigation; I think that the fondness for litigation is the exception.

2254. Do you find that many are deterred from trying their causes in the Court of Session in consequence of uncertainty and want of confidence in the decision?—A very great many.

2255. Do you consider that it is a spirit of obstinate litigation, or a desire to obtain justice, which induces unsuccessful suitors in the Court of Session to appeal to the House of Lords?—It is a dissatisfaction with the judgment obtained, and their hope that a more deliberate hearing, and an able mind applied to it, will obtain them redress.

2256. Are there not very great complaints of the imperfect manner in which causes are heard in the inner houses of the Court of Session?—There is a great want of confidence in the inner house on that account.

2257. Is there any thing like the same confidence of uniformity in the decisions pronounced by the judges of the inner chambers of the Court of Session, as in the judgments pronounced by the House of Lords?—I would say that we have great confidence generally in the judgments of the Lord Chancellor of England.

2258. *Mr. Ewart.*] On what ground have you such superior confidence in the judgments of the House of Lords?—He is removed from all local feeling or prejudice; he hears causes with much more deliberation, and he applies generally a powerful mind to the adjudication of the cause.

2259. *Chairman.*] You do not mean to confine that to any particular Lord Chancellor, but to apply it generally to the House of Lords?—Exactly.

2260. *Mr. Ewart.*] What is the particular advantage in the judgments of the House of Lords; is it that there is a greater uniformity of decision, or do you consider it to be merely a superior tribunal to the other?—I have stated already that we get a more deliberate hearing before the Lord Chancellor, and an opinion unbiassed by any local feelings or prejudices; and we have the application of a man of talent and great legal acquirements to the adjudication of the cause.

2261. *Mr. Wallace.*] Are you of opinion, that, were confidence restored to the Scotch courts of review, appeals to the House of Lords would be diminished?—Undoubtedly they would.

2262. Do you consider that caprice has any thing to do with the choice of the lords ordinary?—No; we choose our lords ordinary from our estimate of their abilities and their carefulness in the disposal of causes.

2263. Is the choice made by clients generally, or by their legal advisers?—By their legal advisers.

2264. At the time you choose the lord ordinary, have you at the same time to decide upon the court of review you go before, provided you go before any?—Yes; we are obliged to make our selection at the beginning.

2265. Then

2265. Then you endeavour by every means to select for your clients the most able lords ordinary?—Undoubtedly.

2266. Have the opinions which you have stated to-day been recently formed, or are they of long standing?—I have long entertained those opinions, but they are strengthened with the increasing difficulties and obstructions we meet with in business.

2267. The *Lord Advocate*.] The new system by which it was intended to supersede to a great extent written pleadings, and to introduce to a much greater extent the *viva voce* pleadings, was introduced in 1825?—It was.

2268. Since 1825, have the professional public and the public generally, deriving their information through the profession, been satisfied with the way in which that system has been worked by the lords ordinary in the hearing and decision of causes?—I think so; there has been great satisfaction.

2269. When you said there was a want of satisfaction with what was done in that department of the Court of Session, you refer to the preparation of causes?—Yes.

2270. In which, I think, you said that there was great delay and consequent expense?—Yes.

2271. Is it your opinion that it is in the power of the Court of Session by an act of sederunt to remove a great many of those causes of delay and expense, or do you happen to know that part of those circumstances have arisen from the form of procedure being rigidly laid down by the Act of Parliament of 1825?—A great deal of that has happened from the forms being too minutely laid down by statute.

2272. It might perhaps be an advantage if the court were enabled, by act of sederunt, to make rules to remove some of those difficulties?—Perhaps it would.

2273. You say a great deal of the time of the inner house is taken up in routine business?—Yes.

2274. When you say a great deal of the time, you speak comparatively?—Yes; it forms a large part of the time now occupied by them in court.

2275. Is the time taken up in routine business very large?—From half an hour to an hour.

2276. Is it often an hour?—Very frequently it is above an hour; but I would not say that it is always an hour.

2277. Sometimes it is not half an hour; is it often an hour?—Yes, it is often an hour; sometimes less than half an hour.

2278. Is it your opinion that *viva voce* discussion has been sufficiently carried into effect in the inner divisions of the Court of Session?—No, it has not; that is the great matter of complaint, that counsel are not fully heard before the inner house.

2279. Does that complaint exist in the profession at this moment?—It does.

2280. Has it existed in a greater or less degree since the Act of 1825 was passed?—It has.

2281. Have you a very large acquaintance, not only with gentlemen in your own particular department, viz., solicitors before the Supreme Court, but also writers to the signet?—I have.

2282. Can you state whether the impression which you state now as existing in your own mind is general in both those departments of the profession at this moment?—Very general; I know of no exception to this feeling.

2283. You are acquainted personally with many of the younger counsel at the bar?—I am.

2284. And have had a great deal of intercourse with them in the course of your extensive practice?—I have.

2285. Will you state what is the impression of the junior branches of the bar with respect to the mode in which causes are heard in the inner division?—I think the feeling is general, both on the part of the bar and the solicitors of court.

2286. You think that the same impression which you have stated to exist in your own class of the profession, and also writers to the signet, exists in the bar, and particularly in the junior department?—I think so.

2287. Is the existence of that very well known; is it notorious?—Quite notorious; there is a great want of confidence generally or universally expressed in that respect.

2288. A great want of confidence in the mode of hearing causes?—Yes.

2289. The judges bestow a great deal of labour upon the cases at home, you are aware?—I do not know what they do at home.

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2290. But independently of the labour they bestow at home, the cause of dissatisfaction is, that their judicial labour is not openly and visibly and evidently given to the public?—Certainly; that and their impatience in hearing the counsel; and also that they do not always state their opinions with sufficient fulness to satisfy the parties that they have understood the cause.

2291. Have you ever known it happen in your own practice, in cases in which you were yourself employed as an agent, or in other cases, that you may have witnessed yourself, that the counsel on both sides have made a motion to have an argument put into writing; that is to say, have moved for the ordering of cases expressly because it was thought the only certain way of having their case well considered in the inner house?—I do not at this moment recollect of such a case; but I have no doubt it has often happened.

2292. Has the quantity of time in the inner houses devoted to the hearing and decision of cases in public increased of late years?—I am not aware that it has; they have not met the wishes of the public in that respect.

2293. When you state that one division would do the whole business of the Court of Session if they put out twice as many causes, and sat about five or six hours a day, you make that observation with reference to the time that each division of the court now gives in public to the hearing and decision of the cases?—If they would sit five or six hours, that would be a great deal more than double the time that they now sit in court; and there would be, besides, the time gained by the relief from routine business.

2294. Are you prepared to say how much time either division would occupy if that full and satisfactory hearing, which you say is wished by the profession, were given in public in each case?—No, I am not able to give a precise answer to that; sometimes it might be more, sometimes less, according to the intricacy and importance of the cause.

2295. Then do you feel yourself under present circumstances in a condition to give to the Committee a confident opinion that one division would do the business, whilst the complaint with you and that part of the profession is, that there is not sufficient time given to the hearing and decision of causes?—We have six months of vacation; if it is necessary, the sittings ought to be prolonged into the vacation; if any time was required in addition to the time I have proposed, that ought to be given by the prolongation of the sittings.

2296. You think that that would be sufficient?—I do.

2297. Did you ever hear any complaint among the junior counsel at the bar as to the mode of hearing in the inner house?—I have frequently heard them complain.

2298. That the audience was not sufficiently easy?—Precisely; that they shrunk sometimes from the duty unless their senior was present; that they had not the same chance to be fully and satisfactorily heard.

2299. Dr. Lushington.] You have spoken of the outer house, and you have said that there is considerable delay in the lord ordinary coming to his decision upon the causes; was that delay longer prior to 1825 than it is now?—I have already answered that it was not; so far as I remember, there was no delay in hearing a cause previously to that period.

2300. Was the period between the commencement of the cause and its finally leaving the lord ordinary longer prior to 1825 than it is now?—I am not prepared to state that, because we have had many improvements since that time; we have had a great deal of legislation, and I would say that the alterations have been all improvements; it would have been better if they had been all enacted at one time, but they certainly have been improvements.

2301. Therefore, looking back to the period antecedent to 1825, you are not prepared to say that the delay in bringing causes to a conclusion before the lord ordinary has been greater of late than it was before 1825?—I speak entirely with reference to hearing the causes when enrolled for debate, and to the preparation of causes.

2302. But from the commencement of the cause to the conclusion of the cause before the lord ordinary, is the time which is occupied since 1825 greater than it was before?—I should perhaps state what was wrong if I were to give any statement upon that subject; I am not aware that it was longer then than it is now.

2303. The Lord Advocate.] With the two full representations, and all the revising and condescendence and answers that used to go on before?—I would not like to speak positively; but I believe there is more delay at present than there

there was then, reckoning from the commencement of the cause to the judgment given by the lord ordinary; the Lord Advocate states correctly, that there were two representations, but one was generally a short representation, refused as soon as given in; and the other it was obligatory to put in in three weeks, and it was in the power of the other party to answer it the next day if he chose, so that those representations occupied no long portion of time.

2304. Dr. Lushington.] Do not you think, prior to 1825, the mode of proceeding before the lord ordinary was much more dilatory than the mode of proceeding since 1825?—It was calculated to be, and might be made more dilatory; but I do not think in point of fact the time occupied was so much as at present.

2305. Then you think the pursuer, since 1825, in bringing his cause before the lord ordinary, would be longer before he obtained his judgment from the lord ordinary than he would before 1825, according to the old practice?—Yes, and more uniformly so; formerly before a lord ordinary we sometimes got a judgment in a very short space of time.

2306. You have stated that in former proceedings there was an opportunity of the lord ordinary revising his judgment; you do not think that would be desirable?—No.

2307. Did the circumstance of the business being more divided among counsel than at present arise from there being less *viva voce* hearing than there is now?—Partly; we had more causes then and more proceedings in each.

2308. Then, in point of fact, you trusted to the mode of proceeding then existing, as affording an opportunity, in case there had been a failure in the first hearing before the lord ordinary, to correct that failure?—No doubt.

2309. Supposing there were to be only four judges in the inner chamber, you calculate that they would be sufficient to do the work in this manner; you would save them the routine business, and you would then require them to sit from five to six hours a day?—Yes.

2310. Your calculation is founded upon the length of time which the two divisions now sit in court?—It is.

2311. Can you form any opinion yourself as to the length of time which ought to be occupied by a judge, doing his duty, in considering the cases out of court?—I have no doubt that the court, even when disposing of the business of both courts, would not have so much labour as our leading counsel now have, or any thing like it.

2312. The question is whether you can form any computation of what ought to be the time a judge, doing his duty, would expend in reading the papers, as compared with the time he now expends in court?—He would have the papers to consult in the causes that were in the roll, and I should think he would have less than 100 quarto pages to peruse, or to refer to rather than to peruse.

2313. What quantum of time do you apprehend the perusal, or the reference to those papers, would occupy?—I am not prepared to estimate that just now.

2314. According to your proposition, the four judges would have not only the whole business in court to dispose of, which we will take for granted would be double the existing business of one division, but upon those four judges would also be laid the onus of doing double duty out of court; have you taken that into your consideration?—I have.

2315. Do not you conceive the duty of a judge to be to listen attentively to all the counsel say in court?—Yes.

2316. You have spoken of a judge trusting to counsel; do not you believe it is his duty narrowly to examine the record, from the beginning to the end, to see that the statements of the counsel are confirmed by that record, or is he to take it for granted, even upon the uncontradicted statement of counsel?—I think he may safely trust to the statement of counsel as to those parts of the record which are important.

2317. Then he trusts to the judgment of the counsel as to what is important and what is not?—So he does.

2318. But if a judge is to do his duty to the public, ought he not himself to form an opinion as to whether this or that part of the record be important or not?—I cannot imagine the case of an important part of the record being omitted by the counsel for the parties.

2319. Then your opinion proceeds upon the presumption of the infallibility of counsel with respect to the record, does it not, that they will make no mistakes?—I think a party commits his matter to his counsel, and he must abide the consequences.

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2320. But are there not very many causes in which the interest of the public is at stake in a just decision as well as the interest of the parties?—There may be; but you are alluding to the adjudication of questions of law; our records are confined to matters of fact and averments in the particular cause before the court.

2321. And law arising out of those facts?—Yes.

2322. And the nicest question of law may be altered by a very minute difference in the fact, may it not?—No doubt it may.

2323. May not the counsel likewise omit a point of law?—He may.

2324. Upon a narrow examination of the record, the judge may discover it?—He may.

2325. May not the consequence be, that a judgment, if so given upon the argument of counsel, may enter your books of reports and be cited as an authority, and yet hereafter, upon the inspection of the record, the record will not bear out the judgment?—It may happen that a plea may escape the notice of counsel, and it may be noticed by the judge; no doubt of that.

2326. Does it not happen in your courts that the judge sometimes suggests new views of facts, or new views of law, from having perused the record?—It may happen, but it does not very often happen.

2327. You have spoken of the judge trusting to counsel for their research; upon consideration do you not think that it is the duty of the judge, when he has heard cases cited and legal doctrines laid down, unless he entirely remembers the whole purport and effect of the cases cited, himself personally to consult and examine those cases and see whether they support the doctrine attempted to be elicited by counsel?—I think so.

2328. Then he cannot trust to counsel altogether?—No.

2329. Must he not do more; having examined all the cases cited by counsel on both sides, is it not his duty to examine the books for himself and endeavour to find whether there are not other cases bearing upon the same point?—I think so.

2330. Have you not questions new to the law of Scotland frequently occurring upon mercantile points?—Sometimes.

2331. Am I not right in supposing that the whole mercantile law of Scotland, its commerce having grown up apparently at a more recent date, cannot be so well settled as the mercantile law of England?—We borrow a great part of our law from England in mercantile matters.

2332. What time ought the judges to expend in making themselves masters of those branches of the law of England which constantly are brought to bear upon mercantile questions in Scotland?—I am not able to specify the time to be devoted to that; it must differ in every case which occurs.

2333. But you know that there are very many books of reports in England upon those questions?—I know that.

2334. You know that there are also many treatises constantly coming out of the press upon that subject; do you not think that a judge of the Court of Session ought to occupy a reasonable portion of his time in studying the general doctrines of English mercantile law?—Undoubtedly; I think the judges of the Court of Session should do so.

2335. You cannot estimate the period required in doing that?—I cannot.

2336. Then do I understand you that you cannot estimate with accuracy either the length of time which the judge ought to employ in the examination of the records and the cases, in comparing with the original the authorities cited, in searching for new authorities, or in obtaining general information as to those parts of the law of England which bear upon the law of Scotland?—I can only say, upon the whole, that, in my opinion, the judges would not, after all, require to labour so hard as the well-employed counsel.

2337. But you cannot estimate accurately the time that they would expend?—No.

2338. Do you not think it desirable that, in a question of importance, the judges should come prepared with deliberately written opinions?—I think it is very desirable that the court should give their deliberate opinions, and, where they differ, that the opinions of the judges differing from each other should be given.

2339. Is it not desirable, with a view to keeping the law of Scotland uniform and consistent, that the reasons of the judges for the opinions they so deliver should



should be most distinctly, clearly and accurately stated?—Yes, in all cases of importance involving what are to form future precedents.

2340. Can you at all estimate the time that a judge would require to prepare a deliberate opinion upon a case of difficulty?—It must always depend upon the nature of the case, upon which he has to deliver his opinion, what time he will occupy in the framing of it.

2341. After all those considerations, are you still confidently prepared to say that four judges could fulfil all the duties which have been enumerated, a part of which you are not able to ascertain the time it would take to fulfil them?—If relieved of the routine business I have mentioned, and their daily sittings lengthened, I think they would have time; but, if necessary, I think those sittings should be prolonged into the vacation, so as to give them sufficient time to overtake the business.

2342. Have you a firm opinion upon that subject?—I have a strong opinion, though I am not able to estimate the time devoted to the examination of the records and printed cases.

2343. Assuming your proposition to be adopted, have you ever considered the consequences if the experiment should fail?—I have not considered the consequences of the failure of the experiment, certainly; but there is something absolutely necessary to be done to extricate us from our present position; our progress is stopped at present in the outer house.

2344. You have not considered whether any evil consequences might result, if it should turn out that one chamber was not able to decide all the cases?—I do not apprehend any consequences.

2345. Do you know what the average annual increase of the bar in Scotland is now?—No, I am not able to state that; but it has not been so large of late years as formerly.

2346. Is there any increase of the bar?—There is an annual increase of the bar; that is, there are fresh admissions.

2347. The *Lord Advocate*.] And there are annual diminutions, by deaths and otherwise?—Yes.

2348. Dr. *Lushington*.] Can you state how many upon an average during the last three years were admitted to the bar of Scotland?—I should state that the bar and the law agents for many years were increasing at a great rate, but I think they have had a check lately; there was a greater supply than the demand.

2349. I have seen it stated that no more than six were admitted to the bar last year; do you apprehend that statement to be correct?—I am not acquainted with that; but I know there have been a great deal fewer law agents admitted, and fewer apprentices entered to the profession.

2350. Mr. Serjeant *Jackson*.] With reference to the branch of the examination which has been so ably conducted by Dr. Lushington upon the last topic, are the English decisions upon maritime law quoted and admitted as authority by the Scottish courts?—They are.

2351. Then the English books of report, as well as the Scotch books of report, form part of the library of a Scotch advocate?—They do.

2352. The judge in Scotland therefore is required to be cognizant with the course of decisions in the English courts of justice, as well as the course of decisions in the Scottish courts of justice?—Yes.

2353. You have given us the opinions of gentlemen of consideration, both at the Scottish bar and in the other branch of the legal profession in Scotland, as to the delays, and remedies for those delays, which exist in the despatch of business in the Scotch courts; I observe that Mr. Graham Bell proposes, by way of remedy for the delay, first, to take from the lords ordinary all the motions which are not to be opposed, and transfer them to the clerks; are you aware that it is not possible *à priori* to determine what applications shall be altogether unopposed?—I have already stated that I think the proposal of the clerk disposing of motions of course is liable to the objection taken to it by the Law Commission, and I have proposed that, instead of that, the preparation of causes should be intrusted to the junior lord ordinary, or else that the lords ordinary themselves should dispose of them at chambers.

2354. But the question relates to the remedies proposed by Mr. Graham Bell; are you aware that it is not possible to determine *d priori*; what applications to the court may not be opposed?—Of course we cannot know till we have seen the other party whether they are to be opposed or not.

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2355. Would there not therefore be a great practical difficulty in adopting that suggestion of transferring from the lords ordinary to the clerk motions which it is not meant to oppose?—I have already stated that.

2356. You have stated another objection, viz., that probably the parties might be discontented with the decisions come to by the clerk, and might therefore appeal to the lords ordinary from the clerk; that would produce a double consumption of time?—Yes.

2357. Besides that, it has been proposed not to let the bar practise in all the courts, but to confine them to some of the courts; in your judgment that would not be an expedient change?—I do not see how it is practicable to confine counsel to particular bars; I think that can be accomplished only by an arrangement; if we had fewer tribunals sitting, and they did not admit of the excuse of the pre-engagement of counsel, and did not permit counsel to leave the bars while debating a cause, that would accomplish the object, because counsel would not then undertake causes unless they were able to attend; and if we had three tribunals sitting daily, instead of six, I think that could be accomplished.

2358. The effect of that would be to leave the bar without legislating upon the subject, or making an act of sederunt to accommodate themselves to the course of proceeding adopted by the court?—Yes.

2359. Would not that have the effect of diminishing very much the quantity of business which eminent barristers in leading practice might discharge?—It might deprive them of some cases; but I think, on the other hand, it would secure to them others; and I think the profession generally would be inclined to pay higher fees to the counsel than they do at present, when we instruct our counsel very much upon the chance of their assistance, which is a very unsatisfactory mode of doing business.

2360. Would it not reduce the number of causes in which a counsel of first-rate business was engaged, by nearly one-half, if the plan you have suggested were adopted?—If the inner houses were put into one, those counsel might expect to be employed in a much greater number of causes there. In my opinion, they might be deprived to some extent of the employment before the lords ordinary, but that is the only way in which it would affect their practice. I think that the other would be a compensation.

2361. Your opinion is, that there would not be such a diminution of income to the most eminent men at the bar as to be a discouragement to them in practising in the courts?—I do not think there would be a diminution of income, and there would be great comfort in the way of doing business.

2362. You think the augmentation of fees that would take place, with the perfect consent of suitors, would go a great length in compensating counsel for the loss of causes in the outer house?—Yes; but whilst they might lose some cases in the outer house, they would gain some in the inner.

2363. And in that respect you think that they would gain in the inner house that which would make amends for what they lost in the outer house?—I think in both those ways they would.

2364. You have stated that there is a general complaint not only amongst suitors and gentlemen of your profession, but amongst the gentlemen at the bar, that causes are not sufficiently heard in the inner house?—Yes.

2365. The length of their speeches is curtailed?—There is an impatience exhibited on the part of the judges, and a formed opinion, which discourages them from speaking. It is not an uncommon thing for them to say, that the judges are for or against a party before the case is heard.

2366. You do not mean to have it understood that any improper impatience is manifested by the judges in the hearing of causes?—I do not like to make reflection upon the judges, but that is my opinion. There is an undue discouragement, I think.

2367. That arises probably more from the circumstance of their having read the papers at home, and to a certain extent formed an opinion of what is relevant and important in the case, and what is irrelevant and unimportant, than from any degree of impatience or irritability on their part; is that your opinion?—Their coming to the hearing of the cause with their minds made up on one side prevents their hearing the matter patiently.

2368. That is what induces the manifestation of what is considered impatience?—Yes.

2369. It

2369. It is one of the suggestions here for the remedy of the evils of delay in the outer house that the speeches should be shortened?—Yes; Mr. Graham Bell suggests that; and they would be shortened in point of fact without being shortened in reality, because if they were heard continuously, the same speech would occupy a much shorter space of time than it does now, when it is protracted over weeks, and heard piecemeal with many repetitions.

2370. But if the judges in the outer house, with a view to check the consumption of public time unnecessarily, were to interpose and shorten the addresses of counsel, and were to intimate that it would be better for them to confine themselves to certain points, and curtail their speeches, would there not be great danger that that would bring upon the outer house the same imputation of impatience which it appears exists with regard to the inner house?—A great deal must be left to counsel in that respect, that they will not occupy the time of the court unnecessarily.

2371. But, nevertheless, you are aware that oftentimes suitors require longer time from counsel, in the length of speech, than the counsel would himself approve of?—I believe that counsel in that respect are regulated by their own opinion, and not the opinion of their clients.

2372. Do not you think that the clients sometimes think that counsel ought to go at greater length into the case than the counsel thinks desirable?—I have no doubt that that may happen.

2373. There may be danger of the counsel sometimes going to a greater length than he in his judgment thinks necessary, in order to gratify his clients?—I do not think that that often happens.

2374. But sometimes?—It may.

2375. You have stated that among the junior counsel there were complaints on this subject, of not being heard themselves?—I have heard both senior and junior counsel complaining of that.

2376. It would be an advantage to the junior counsel if the senior counsel were not in so many cases as they are now, the juniors would be occupied more?—The juniors are instructed along with the seniors at present, even when they are not expected to speak.

2377. Something was said of a monopoly of business at the Scottish bar; I should collect from the answer you made before, that that monopoly of business at the Scottish bar was nothing more than that existing in the profession in other countries, from men occupying a distinguished place and having a high character for industry and talent?—Yes.

2378. There must always be such a monopoly as that?—Yes.

2379. There is no other monopoly at the Scottish bar than that?—No other.

2380. The suitors would prefer, naturally, to commit their causes to men of the greatest experience and ability?—Yes.

2381. And that leads to the use of the term monopoly?—It was not I who used the term monopoly.

2382. Does it frequently happen at the Scottish bar that gentlemen receive fees who are wholly unable to give any assistance to their clients?—That happens very frequently.

2383. That is owing to this arrangement of the courts that you complain of?—Yes.

2384. You have spoken of the quantity of business despatched in the Sheriffs' Courts; there are 33 of those courts in Scotland, are there not?—Upwards of 30; 32 or 33.

2385. You spoke of 13,000 causes being disposed of in those courts per annum, on an average of five years; for what amount can causes be taken to those courts?—From the smallest to the largest amount.

2386. What is the smallest you have known?—I have seen a cause for a half-penny; but I should explain that it was for a market rate; for example, it was to settle the right to claim that rate; but the halfpenny was the only stake in that particular cause.

2387. Between man and man; between the people of the poorer classes of society, what is the lowest amount in question?—Since the Sheriffs' Small Debt Courts have been introduced, they have been largely taken advantage of; 8*l.* 6*s.* 8*d.* is the highest in that court; they are like the Court of Requests in this country: the decisions cannot be reviewed in any way; the Justice of the Peace Courts have a similar jurisdiction to the extent of 5*l.*

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2388. Is the Court of Session prohibited from deciding causes below a certain sum?—They cannot interfere, in the first instance, in causes below 25*l.*; they have only an appellate jurisdiction in such cases.

2389. Does it often happen that causes for a few shillings come before the Small Debt Courts?—Yes, I have no doubt of it; the causes before those small courts, I ought to observe, are not counted in the number of 13,000.

2390. Sir C. Grey.] Would not this be a convenient new distribution of the business: first, that there should be only one inner house or chamber of review; secondly, that one judge singly should take all unopposed motions of every sort, that is, where there is no opposing counsel or agent; then that the second division of the inner house should take all the first hearings of causes, sitting as a court of four, instead of the first hearing being before a single lord ordinary; and that the four remaining judges, sitting as lords ordinary, either singly or as a court of four, should take the remaining business of the lords ordinary, which would chiefly be the preparation of the records and contested motions; supposing, in addition, that I can show that it would be so arranged that no more than one of those courts should ever be sitting at the same time, and yet that they should sit longer than they do now?—I do not think it advisable to dispense with the outer-house judges; by that arrangement you propose to have four outer-house judges appropriated to the preparation of causes and contested motions; my opinion is, that a single judge would be quite competent to do all that business.

2391. Then, if you think that a single judge would do that, you must admit that the lords ordinary sitting as a court of four would be able to get through that business?—No; for this reason, that the separate lords ordinary will hear separate causes, and, from experience, we find that less than half of the causes decided by them are carried by appeal to the inner house; the sifting they have undergone before the outer-house judges in the majority of cases satisfies the party to acquiesce in the judgment; and even in those cases that are carried to review, the points for discussion are very much narrowed, so that it comes to the inner chamber in a much narrower compass than it stood originally.

2392. You say that one lord ordinary would get through all the preparation of causes, and of contested motions; by my arrangement, I would appropriate four lords ordinary sitting together as a court for that purpose; and if one could do it by himself, I should suppose that the four sitting together as a court would do it?—I think that one judge would be able to do it better than four.

2393. You think four would be able to do it?—No; because it would be an open court with counsel attending, and the judges would not be able to go through it so quickly.

2394. Must not counsel attend in contested motions?—I think not; a few words of explanation at chambers would be all that would be necessary. The plan proposed would occasion double business, because the motions must all be called before the judge sitting singly to ascertain whether they are opposed or not; and then, opposition being made, they would have to be remitted to the four, and to be heard in a formal way, which I think would not be necessary, except in a few cases.

2395. It is always known in English courts whether the causes, on being set down, are defended or not?—Yes; but we have motions in litigated causes which are not opposed; but we do not ascertain whether they are to be opposed by the opposite party till the causes are called; for example, we make a demand for the recovery of writings, and the question for the judge is, whether we have a right to recover the writings, or whether they are relevant to the cause, or confidential in their nature. I would say, generally, upon the question, that I think the arrangement quite impracticable.

2396. Have you any thing further to add to the main question?—I do not think it necessary to add any thing more.

2397. What is the exact period of vacation at present?—Six months and three weeks; that is three weeks at Christmas and six months in spring and autumn; it is nearer seven months than six.

2398. It has been stated that for about two hours a day the judges sit in court; how many hours would that be in the year?—It would be 134 hours to each court, or 268 hours to both, in the year.

2399. Supposing that the judges were divided into three courts upon my arrangement, would not this distribution of the business as to time amongst them be at once more efficient for the transaction of business, as comprising more business

business hours, and more convenient, and easy and pleasant to themselves, viz., that one court of four judges should sit seven hours a day on the Monday and Thursday, that the other court should sit seven hours a day on the Tuesday and Friday, and that the third court of four judges should sit seven hours a day on the Wednesday and Saturday, the hours of business being from nine to four, and that the vacations in consequence of their sitting only two days a week should be shortened to 13 weeks in the summer, a fortnight at Christmas, and a week at Easter, according to which arrangement each court would sit 469 hours in the course of the year instead of 268, and yet every judge would have five days in the week to himself for reading papers and for leisure, except when he might be employed in the business of the Justiciary or the Admiralty, or other business out of the regular course of the Court of Session?—Putting the hours together, they amount to only 1,407 hours in all; but if you add the 268 hours employed by the inner house to the number of hours employed by the outer house judges in hearing causes, it produces a much greater time devoted to the adjudication of causes; in the one case it amounts to 1,407; but even reckoning the short period now devoted by the inner house to the hearing of causes, there would in the other case be 2,408 hours; each lord ordinary sits 107 days, four hours each, or 428 hours in all.

2400. Upon the average, you think that all the five lords ordinary sit four hours a day?—Yes.

2401. How is it possible that the lord ordinary who has decided only 30 causes should be occupied four hours a day?—It happens in consequence of being occupied with routine business, and of the interruptions I have mentioned. I do not think, by the arrangement proposed, the business of the court could be accomplished; it is very desirable, in my opinion, to continue the duties of the lords ordinary, each of whom disposes of a great number of causes that are not brought under review, and each of whom is able to narrow very much the points of discussion raised for the inner house when the cause is submitted for review; by the arrangement proposed, there would not be nearly so much time devoted to the disposal of causes as in that which I have submitted.

2402. You observe that this arrangement would at all events obviate all your objections against the difficulty of getting counsel to attend in different courts at the same time?—Of course it would obviate that objection; but my objection is not on that score, but because it would not do for the despatch of business.

2403. It would obviate the objections that have been stated against the sittings not being sufficiently continuous or consecutive so as to get the cases disposed of in one day?—It would obviate that objection.

2404. Then, if it has those advantages, might not your objection, that there would not be a sufficient number of hours in the whole, be obviated by letting the four lords ordinary, for the preparation of records and all contested motions, sit separately, as I have put it in the first instance, because then there would be no more distraction of different courts than there is at present; the number of hours of business would be increased by the power of one of the courts being multiplied by four?—I think it would be a great waste of the judges to have four judges appropriated to the preparation of causes; I think that three of them would be unnecessary for that purpose.

2405. Then the only other business that the lords ordinary now transact which I have supposed to be transferred to one of the divisions of the inner chamber, is the first hearing of causes; if you think that the four lords ordinary would not have business enough without those first hearings, might not they give employment to that division of the inner chamber by sending only the most important first hearings to be heard before that division as a court of four, instead of being heard before any one lord ordinary?—I do not see how the proposal you make would abate the evils of which we complain in our courts.

2406. It would obviate two great evils; first, that the business is not sufficient to remunerate counsel, unless they are employed in all the different courts that are now sitting at the same time; and, secondly, it has been stated as a great grievance that the sittings of the inner chamber for two hours at a time, and the sittings of the lord ordinary are not sufficient to enable you to get through any hearing at one time; that the business is broken off and renewed when nobody can reckon upon it?—I hold in my hand the evidence of two gentlemen given before the Law Commission, who suggest that the inner houses ought to sit on alternate days; with the permission of the Committee I will read that evidence. In the first Report of the Law Commission, page 44, the late Hugh Macquene, who was

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an able solicitor and in very extensive practice, states it as his opinion that "the business of the inner house would be better performed, in every respect, if, instead of both divisions meeting daily and at the same hours, one of the divisions were to sit on Mondays, Wednesdays and Fridays, leaving the rest of the week for the other division; in this way a day would intervene between each court day of the division, and the court actually sitting would always be attended by a full bar, and parties would not, as at present, be deprived of the aid of their leading counsel by the business of the other division." "From an examination of the length of time during which the divisions actually sit at present, I am satisfied that the whole business of the inner houses could easily be despatched by the arrangement which I now venture to suggest. If their lordships would consent to sit from ten to three o'clock on each court day, it would be expedient for the court to sit out those five hours and to order a commensurate extent of cases to the roll, so as to render it impossible to pretend that cases had been hurried through in order to release from business to relaxation any one about the court." That opinion recognizes the idea that the court may in one day despatch the business of two, and that in that way the business might be done. There is another agent in extensive practice who gives the same opinion before the Law Commissioners.

2407. Mr. Wallace.] Who is that agent?—Simon Campbell; his evidence is in page 50 of the same Report: "If the lords ordinary were to continue and decide causes in the outer house, it would, I think, be a great improvement for them and the inner house to sit on alternate days. This would prevent the constant interruption of the debates by the counsel being called from them to the inner house. It would also save a great deal of time to the counsel and agents, who on inner-house days would not require to wait on for the chance of causes being called in the outer-house rolls, and the debates upon the other days would be heard without interruption, and with more comfort and satisfaction to the ordinaries, and to all concerned."

2408. Mr. Ewart.] One of those opinions contemplates each of the two inner houses sitting on alternate days; the other contemplates the outer house sitting on one day, and the inner house on the other day?—Yes; but both recognize the ability of the court to despatch in one day the business of two.

2409. You alluded to shortening the vacations; how much would you propose to shorten the vacations?—Just as the business might require it. In my opinion, it would not be necessary with the present amount of business; by a recent Act of Parliament, Her Majesty is entitled to order the court to prolong their sittings, or the court may of themselves continue their sittings.

2410. Mr. Wallace.] For how long?—I am not able to answer that at the moment; I think it is a month.

2411. Mr. Ewart.] You would not propose to fix a longer duration?—No, not unless it was necessary.

2412. You stated that there was a want of uniformity in the decisions of the inner houses; to what do you attribute that want of uniformity?—The differing opinions of the judges.

2413. Do you attribute it to the existence of two houses?—Of course; it would not exist if there was only one.

2414. Then you mean to say that they come to conflicting decisions sometimes?—Yes.

2415. You complain, and it has been a common complaint before the Committee, that counsel are called from one house to another; that there being two inner houses, counsel are prevented from acting in one of the inner houses, by being engaged in the other house; if the two inner houses were consolidated, this objection could no longer exist?—It would not.

2416. Counsel would be present in the one consolidated court?—Yes.

2417. Mr. Wallace.] Is it your opinion that a considerable portion of the business might be advantageously performed during the present long vacation?—The business of the courts might be very much advanced by something being done in the vacation.

2418. Which cannot be done at present?—It cannot be done at present; by a late statute we are entitled to call some causes, that is, bring them into court, on two box days; but we have no opportunity in case of absence or failure to lodge defences to obtain judgment; and we cannot advance a cause that has been already begun.

Robert

*Robert Bell, Esq., called in; and Examined.*

2419. *Chairman.*] I BELIEVE you are an advocate at the bar of Scotland? *Robert Bell, Esq.*  
—I am.

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2420. You hold the situation of procurator to the Church of Scotland?—I do.

2421. How long have you been in practice at the bar?—Nearly 36 years.

2422. During that time you have been engaged in several of the principal and most important causes that have been heard before the Court of Session?—Yes, I have been engaged in all departments of the profession.

2423. Do you consider that the present establishment of judges in the Supreme Court is more than sufficient to transact the business which comes before them? —I think it is not more than sufficient.

2424. There are five judges sitting in the outer house; is it your opinion that the business which comes before those judges is sufficient to occupy their whole attention during the period that they sit?—I think it is fully sufficient to occupy their attention, and on some occasions they get into arrear, although they do pay close attention to the duties of their office.

2425. Is it the practice of those who enter into litigation before the lords ordinary that the pursuer should select the judge before whom he brings his case?—Yes, it is so.

2426. Do you consider that that is a practice attended with advantage to the public?—I think it is attended with advantage.

2427. In what respect?—There must always be differences, both in the capacity and knowledge of men, and it is most desirable, therefore, that parties should not be under the necessity of bringing very important cases before any but the best judge that they can select; I think that is the chief advantage of it, and it appears to me to be an important one.

2428. But supposing there was one judge in particular among the lords ordinary who was more popular either on account of his talent or quickness in despatching business than another, would not the system of the pursuers choosing their own especial courts be liable to throw a vast weight of business on that particular judge, and therefore to create considerable arrears in his court, and consequent delay in the administration of justice generally?—It certainly must have that effect to some extent; but to a great degree it corrects itself: the delay, which occurs from a particular judge being over-burdened with business, leads pursuers in the general run of cases to select a judge who has less to do, for, generally speaking, pursuers have no interest in delay; there can scarcely be an instance of a pursuer bringing his case before a judge in the hope that he will thereby have it delayed.

2429. Then you do not consider that it would be expedient to equalize the work before the lords ordinary, by equalizing the number of causes upon each of their rolls?—No; in my opinion it would be very inexpedient.

2430. But suppose such an alteration were made, would you consider, in that case, that the number of lords ordinary were more than sufficient for the business that would come before them?—I should think not.

2431. *The Lord Advocate.*] You are aware that there are very large arrears before some of the lords ordinary now; do you think that those arrears could be worked off, and that there would be time to spare if the causes were equally distributed?—I see no reason to think so. It is impossible to conjecture what would be the consequence of that course; if you were merely to divide the cases equally numerically, it would not obviate the objection I have stated. We see very well that some of the hardest working judges, who are most conscientious in the discharge of their duty, and are men of quick parts, get into arrear with a smaller number of cases than other judges actually get through.

2432. *Mr. Wallace.*] How do you account for that?—I would account for it in this way, that the most important and heaviest cases are taken to the judges who, in the opinion of the parties, are best qualified to decide those cases; and if you were to equalize the causes, it might happen that a judge might get through a greater number of cases than he has at present, while other judges might not then get through the same number of cases. I cannot see my way to the conclusion that there would be greater despatch of business by a numerical division, and you can adopt no other mode.

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2433. *Chairman.*]



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2433. *Chairman.*] Do you think, since the passing of the Judicature Act, *viva voce* pleadings have been more adopted before the lords ordinary than they were previously?—Yes, they have.

2434. Has that given generally greater satisfaction to the public?—I think that has given great satisfaction.

2435. With respect to the inner house, do you consider that it would be expedient to dispense with either of the divisions as a court of review, and substitute one court of review in their place?—No, I do not.

2436. Do you consider the number of judges in either division as too many or too few; would you recommend any alteration in their number as they at present stand?—I can recommend no alteration in the number as they at present stand. I think four are sufficient for the business; if you were to diminish them to three, you might very often have cases decided in the inner houses by two judges against one, which one might be of the same opinion with the judge who had decided it in the outer house, so that there would be two and two, and parties would have more confidence in the judgment of the outer-house judge and one of the inner-house judges than in the judgment of the two others, which would be the judgment of the inner house. That is my opinion. I think it would lead to great dissatisfaction and to the multiplication of appeals to the House of Lords.

2437. Has any dissatisfaction been expressed consistent with your knowledge by that branch of the profession to which you belong, of the manner in which causes are heard in the inner house?—We are not so well satisfied with the manner in which causes are heard in the inner house, as with the manner in which they are heard in the outer house.

2438. Does that dissatisfaction arise from the feeling that the Act of 1825 has not been carried out so fully in the inner house as it has in the outer house?—It has not been carried out so fully in the inner house as it has in the outer house, and the dissatisfaction, as far as I understand the feeling of the profession, arises from that source.

2439. Will you state to the Committee to what cause you attribute it that the spirit of the Judicature Act has not been so fully carried out in the inner-house as it has in the outer house?—I think there has not been sufficient time given as yet for the Judicature Act to be carried into full execution in the inner house; judges who were trained to a different mode of conducting business prior to the year 1825, naturally, as it appears to me, had a tendency to continue the method in which they conducted the business then, and that has acted as an impediment to the full operation of the Act of 1825 in the inner houses. I will explain what I mean by saying what I suppose the Committee have been already informed of, that before the passing of the Judicature Act the judges were accustomed and were trained to decide almost all cases upon written pleadings, and to make up their minds at home, and come to the court to give their judgment after a very few observations made to them from the bar. That was the general mode of conducting business; the judges, being accustomed to that mode of conducting business, naturally desire still to inform themselves from the written pleadings laid before them, which are much shorter than they were before, and do not give the full information which the court formerly acquired from the long printed papers; but still they make it their business to study those at home, and when they come to court to give their judgment, they do not require, and are not disposed, as it appears to me, to hear the same full argument that the judges in the outer house do who have not those written pleadings before them, or at least have not studied them in the manner that is done by the judges in the inner house.

2440. Is it your intention that the Committee should understand, that while the written pleadings have been made shorter by the passing of the Judicature Act, the oral arguments have not been permitted to be longer in the inner house than they were formerly?—No, they are longer; but they are not, in my opinion, sufficiently long for the full sifting of the cases.

2441. *The Lord Advocate.*] In a great many cases decided in the inner house there is no written argument at all, so that the only argument is that used at the bar?—I should explain myself. I used a wrong term if I said written argument. I meant the records, which are the statements of facts and pleas in law; and it is very easy to make statements in point of fact, and to suggest pleas in law, which will of themselves suggest argument.

2442. But suggesting argument is not an argument?—I meant to say, that the judges had the argument merely suggested to them in the record, and that they set themselves to consider and study the cases before they have heard counsel.

2443. *Chairman.*]

2443. *Chairman.*] Then do you consider that such study on the part of the judges, and such suggestion to themselves of arguments from the records and pleas out of court, is not satisfactory to those who have causes before the Court of Session? —I think it is not satisfactory; I think it is disadvantageous to the proper administration of justice.

2444. Has it ever occurred to you to observe, that when the judges in the inner house assembled to hear a cause, any impatience has been shown from the bench at observations offered to it by the counsel, on account of the court having been prepared with their decision from the study to which you have just alluded? —Certainly; I have often witnessed symptoms from the court of their not being inclined to hear the counsel at the same length that they are heard in the outer house. It is difficult to say what impatience is exactly. If a man's mind is made up, he does not like to listen to a long argument which he may think unnecessary.

2445. By impatience I merely mean a want of sufficient patience and attention to counsel?—I think I have frequently noticed that, while counsel were allowed to speak as long as they pleased, what they said did not make the impression upon the court that it seemed to me it ought to make. One cannot very well say so in a case of his own; but I think I have made the remark as to other gentlemen, in addition to having felt it myself.

2446. Do not you believe that, notwithstanding the passing of the Judicature Act, counsel feel still most strongly that the judges are prepared to decide causes from study at home, and that they are thereby considerably checked and repressed in their oral pleading before the inner house?—Certainly; but I would explain, that any counsel who insists upon being heard will be allowed to address the court. Generally speaking, no man is actually put down unless he is speaking nonsense.

2447. But is it consistent with your observation, that a counsel often persists in addressing his argument to the court, which he observes is not lending a very attentive ear to it?—Not often.

2448. You stated before that this is an evil which is gradually working its own remedy?—I think it is working its own remedy; I think as the judges who have been trained to the hearing of causes in the outer house are removed to the inner house, the sort of thing which I have been describing is diminishing.

2449. When the spirit of the Judicature Act is carried out to a fuller extent in the inner house, will it not follow that a considerable portion of the judicial business will be done more in public than is done at present?—Yes, necessarily so.

2450. That will give greater satisfaction, as I understand you, not only to the public but to the profession at large?—In my opinion it must give greater satisfaction, because parties will then know distinctly upon what point the court put their judgments; but when they make up their minds at home and give their opinions in court, it is often difficult even for the profession to know the exact questions that they mean to decide.

2451. Do you consider the return which was made to the House of Commons, which you may have seen, showing the number of hours that the judges of the inner house sat daily in court, is any just criterion of the business that comes before those learned functionaries?—It is no criterion of the business that comes before the judges, none at all.

2452. Or any criterion of the work which they have to perform?—No; they are at present working at home in making themselves masters of the causes, which I think they would do better if they did it in court; but still I believe their time to be very fully occupied in the duties of their office.

2453. *The Lord Advocate.*] The change of system was introduced in 1825, by which it was intended to substitute, to a very great extent, parole pleading for written argument?—Yes.

2454. From that time forward the way in which causes have been heard and decided by the lords ordinary has given great satisfaction?—Yes.

2455. Are you of opinion that litigants in general, and the professional public, and the public at large, are well satisfied with the present administration of justice in that part of the Court of Session?—In that part of the Court of Session the profession is well satisfied, and I believe the public are so also.

2456. There are still complaints about the mode of preparing causes?—Yes.

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2457. Has

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2457. Has the same satisfaction been felt all along with the inner house?—No, it has not.

2458. Is the want of that satisfaction general?—In my belief it is pretty general.

2459. You have communication with almost every gentleman in your profession, and also a very large acquaintance, in business and otherwise, with the other parts of the profession?—I have; and I should say, the number of persons who are satisfied with the mode of conducting business in all the departments, so far as my observation goes, is small.

2460. Speaking particularly of the inner house?—Yes, it is to the inner house I refer.

2461. From your own observation, will you be good enough to tell the Committee what is your impression about the mode of hearing causes that exists among the junior members of the bar?—The junior members of the profession must of course feel any obstacle in their way much more than men of greater age, or those who have had a greater experience in the profession; they are more easily checked by observing indifference or impatience on the part of the judges than older or better employed men are.

2462. Is it your opinion that there is a want of encouragement to the full discussion of causes, which represses the junior part of the bar in making statements to the court?—I think, where it has occurred to the court itself, that the question is really one of difficulty, that they do encourage the hearing of it; but as to the great run of cases, I would say that the younger part of the profession must feel that they are they not encouraged to state their cases in any detail, but the reverse.

2463. And yet in many of those cases there has been, properly speaking, no argument addressed to the court at all, except the lord ordinary's note?—The lords ordinary write long notes which are generally argumentative which go before the inner house along with the record, and the judges frequently make up their minds from the statement of the lord ordinary, and then it is very difficult in many cases for a young man to get himself fully heard.

2464. In short, the object of the counsel in addressing the inner house, with reference to the particular study they have made, is rather to state particular points than to make a regular argument in the cause?—The object is to attack the note of the lord ordinary rather than to go into a detail of the cause; the counsel attack the points that have made an impression upon the lord ordinary's mind, without entering into the full detail, which I think it would be advantageous that they should enter into.

2465. Why should they not enter into that full detail; what is the feeling that prevents them?—The feeling that the court imagines that what the lord ordinary has particularly noticed is the important part of the case, and that they may think that any thing addressed to other parts of the case is not of importance; and therefore men are very apt to say no more than is necessary to meet the particular views stated in the opinion that has been given against them.

2466. In your observation, has the length of time that the court has sat lately increased much, or does it remain very much the same as it was before 1825?—I do not recollect exactly; I think the Committee will find that better in some of the returns they have had; the lords ordinary sit longer than they used to do before 1825.

2467. That want of satisfaction which you have expressed you mention to be general, is it recent, or has it existed all along since 1825?—I cannot recollect that there has been any time since 1825 during which there was no feeling of dissatisfaction. The inner house, in 1825, passed a regulation by which they were to hear cases one day and were to adjourn to another, in order to consider the matter at home and give their decision. So far as I am aware, they only did so on one occasion. It was forced upon them by the present Lord Moncrieff, then Dean of Faculty, and the result was, that when the court returned to give judgment, they gave a judgment the reverse of that which they had intended to give when he made a point of their postponing the judgment; I think that is the only occasion on which they complied with their own act of sederunt; and it appears to me that it would be an advantage if the judges of the inner house were not to see the record or the lord ordinary's note till counsel began to address them. I think that would render it necessary that they should hear the cases argued at greater length than they do at present; and if they followed the spirit of their own act of sederunt, and postponed the judgment till another day, they might take an opportunity of reading the record after it had been explained, and all the bearings of the case fully opened.

2468. You

2468. You suggest this remedy, of not giving the judges the record till they came to hear the cause, and afterwards postponing the decision till the next day, as a means, in your mind, calculated to ensure that full *vivâ voce* discussion which you think very essential?—To ensure it to a much greater extent than at present.

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2469. Is it the want of that full *vivâ voce* discussion that has been the main cause of dissatisfaction?—I think so; I think if the judges were in the habit of hearing full *vivâ voce* discussion, both the public and the profession would be better satisfied with their decisions than they are at present.

2470. Have you observed that the judges, in deciding a case in the inner house, express the grounds upon which they put their opinions as fully as is desirable?—In important cases they do it, and I believe recently they have adopted the practice of writing their judgments and reading them; of course not reading them slavishly, but they bring them written.

2471. Do they do that where there has been any written argument before them?—Yes; I have observed them doing that in the course of this session.

2472. Even when there has been no written argument?—Yes; there is a case your Lordship was consulted in, which came before the court after you came up to London—the Strathbogie case; there was no written argument there; and the judges came down with written judgments, and read them in court.

2473. Before they had heard the statement for the parties?—No; they heard the statement of the party who applied to them, and then came the next day with written judgments; no appearance was made for the other party.

2474. Are you not of opinion that that is a useful practice?—Yes; I have mentioned that they are getting into that within the last two months.

2475. Is there any practice of their coming into court with written opinions in cases where there have been no written arguments?—No, I am not aware of that, unless they have previously heard counsel.

2476. In those cases they express their opinions *vivâ voce*?—They do.

2477. Are you yourself of opinion that the grounds of the judges' opinions are sufficiently expressed in general when they give judgment?—In difficult cases I think they are sufficiently expressed: in the ordinary run of cases, I think, it frequently happens that they are not; I find it difficult to apply the word generally to one side or the other; it is, I should say, frequently the case.

2478. Would it be desirable that the judges should express, in all cases, satisfactorily of course, less fully or more fully, according to the importance of the cases, the grounds of their judgments?—Yes, I think it desirable.

2479. Do you think, in that respect, there is room for improvement?—I think there is.

2480. If judges do not express very fully the grounds of their opinion, and if there is not a full *vivâ voce* discussion at the bar, have litigants or the public any security at all that their arguments have been fully considered where there is no written argument?—They have no other security than dependence upon the character of the judges, and upon their inclination to discharge their duty conscientiously; but I would say, in reference to the question, however well founded such reliance may be, litigants and the public cannot be assured that their case has had sufficient consideration unless the judges give those deliberate opinions that the Honourable Member speaks of.

2481. And also hear *vivâ voce* discussion?—Yes, that is one reason why a young man or a man in small practice has a difficulty in forcing his address upon the notice of the court, that, from the way in which the cases are managed, the public do not know what they are, and consequently a counsel does not address a judge with a feeling that the public and bystanders will know whether he is right or wrong.

2482. The discussions before the inner house are generally so short that it is very difficult for a bystander, who has not the written papers, to ascertain the nature of the case?—Yes.

2483. Even a professional man would sometimes find difficulty in knowing where the point was?—In the majority of cases a professional man, not in the case, cannot know the exact point which the court has to decide, owing to the want of that oral discussion.

2484. That is, the discussion at the bar is so imperfect with reference to the knowledge the judges have of the case, that even a professional person finds it

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difficult to ascertain where the point is?—Yes; a judge may be perfect master of the cause, and be giving the soundest judgment upon it, but bystanders are not aware of it.

2485. Do not you consider that a cause of dissatisfaction with the public?—Yes, it is necessarily a cause; the counsel in the case understand and very possibly approve of what the judge is about, but the public and the bar can have no knowledge upon it.

2486. Is there a large attendance of the bar in general in the proceedings of the court in Scotland?—Scarcely any attendance at all in general.

2487. To what do you attribute that?—I can attribute it to nothing but to what has been already stated.

2488. That by attending in court they would hear proceedings the nature of which they do not fully understand, those discussions being so short and taken up upon points, so that they are not very intelligible even to a professional person?—Exactly.

2489. There are particular cases that are evidently of importance, where senior counsel in the case frequently state that they are of such importance that they must be heard with more than usual solemnity; those are cases that are entered into at length?—Yes.

2490. And in those cases is there a full attendance of the bar?—Generally there is; unless the business is one of mere detail and matter of fact.

2491. Do not you consider it a great misfortune to the bar, that it wants that means of professional education which is derived from constant attendance in the court?—I think so.

2492. Do you observe in those cases in which it would be useful for young men to attend the courts, that there is any reluctance on the part of the bar to avail themselves of such means of education?—No.

2493. Do you not observe the contrary whenever the proceedings furnish such means of education?—Whenever it is understood that the case is to be fully entered into, and always when it is upon a difficult question of law, I see that young men are anxious to attend and hear what is going on.

2494. But many days there is no use for young men to attend in court, because, if they attended in court, they would understand very little of the business going forward?—They might in most cases receive some information, but it would not be of a satisfactory kind; for the reason you now put.

2495. Is the discussion of a case between the counsel and with the court, in ordinary cases, not that sort of short-hand discussion which implies that all the parties are thoroughly acquainted with it, instead of being a sifting and elaborate statement of the case on both sides?—Generally so.

2496. To the degree you have mentioned?—Yes; and in the great majority of cases a man of a certain standing would expect that the court would be surprised to see him coming up with books; it is only in particular cases that they think of such a thing.

2497. Mr. Ewart.] You have barristers who report cases in the courts of Scotland, as we have in England?—We have.

2498. To be published for the information of the profession?—Yes.

2499. The Lord Advocate.] Do you know whether those barristers are furnished with the record in the same way as the judges of the court?—I believe they are; they were in my time, when I was a law reporter.

2500. Mr. Ewart.] If the proceedings are so much abbreviated as you describe them to be, that even lawyers cannot understand them, how can you have the cases well reported?—Because the law reporters get the record, and they are thereby able to understand the case.

2501. The Lord Advocate.] They are in the same situation as the court itself?—Yes.

2502. Mr. Serjeant Jackson.] Would the junior gentlemen of the bar be furnished with the papers if they desired to make themselves masters of the case?—Not generally. A few might get them as matter of favour from the agents employed in the cases; but the papers are printed at the expense of the parties; there are about 50 copies printed for the court and for the persons employed; gentlemen, as matter of favour, can occasionally get copies of cases if they think it worth while to ask for them.

2503. Then, in truth, it appears to be of very little importance, so far as the public and the profession are concerned, who are not engaged in the particular cause,

cause, that these inner chambers should be open courts, because if the gentlemen of the bar cannot understand the cause as it is going on, the public cannot *à fortiori* understand it?—I do not say that is the general practice of the court; but I say it does happen, in cases where the judges do not think it of importance to give a judgment in detail on the printed papers, where they think they have read so much as to dispense with a full hearing. It is in those cases the bystanders cannot understand what is going on; but where the cases are publicly discussed, or the judgments are given at greater length, the bystanders may understand them.

2504. Is it any large proportion of causes that are treated in the way that you have been complaining of?—Yes, it is a large proportion; but they are causes of inferior importance in point of principle.

2505. They are causes which do not involve any serious question of law?—Yes; I think the judges generally do give their opinions in sufficient detail in causes which they think involve difficulty in point of law.

2506. I should collect from your evidence that you consider this as a great evil, not only as affecting the character of the administration of justice in the courts, but likewise as withholding from the gentlemen of the profession who are rising at the bar that information which they ought to have?—I think so; I do not mean to say that the judges do not do their duty; I do not mean to cast that imputation, but that the proceedings in public are not in sufficient detail to give the public that confidence which they otherwise would have in the decisions of the judges; in the outer-house courts, where they are entirely in public, I have never heard a complaint made.

2507. Then you conceive that it is an evil which calls aloud for reformation?—I think so.

2508. Mr. Ewart.] In the English courts, barristers are in the habit of taking private notes of all the cases for themselves; if I understand you rightly, a young barrister in the Scotch courts could not follow a case with sufficient clearness to be able to take such notes satisfactorily?—In those cases where the minds of the judges have been chiefly informed by the printed pleadings which have been before them, very often the case would be such as you now suggest.

2509. The Lord Advocate.] What proportion, do you think, in one case out of three or four or five, the gentlemen who have not the written papers would so understand the statements of fact, and the arguments that are to be picked up from observations made at the bar, as to be able to make an intelligent and accurate report of that case from their own study?—I do not think, generally speaking, that we state our cases at sufficient length to enable barristers or other gentlemen of the profession to understand a case thoroughly, not once in three times, not so often.

2510. Mr. Serjeant Jackson.] How many of the judges are there in the two divisions of the inner chamber who have served as lords ordinary in the outer court since 1825?—Two in the first division; and we had Lord Corehouse there; he was the third. In the second division we have only one. If the court remains on its present footing, Lord Moncrieff will be removed to the inner house next session, and then there will be two.

2511. This infusion of lords ordinary into the inner chamber has already had a tendency very much to diminish the inconvenience of which you complain?—Certainly; and I make these observations without intending to throw the least reflection upon the other judges, because they were trained, both at the bar, and by sitting for years upon the bench, to the habit of considering the causes at home, and making up their minds deliberately in their own closets; and having been accustomed to that, I think it would be too much to expect that they should altogether alter the habits of 30 years, and adopt a new system, as other men do.

2512. I have understood you as not casting any imputation upon the judges, but as showing that it has grown out of the practice that has been adopted?—I make no reflection upon the judges, for I think it most natural that they should continue their old custom.

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*Veneris, 10<sup>o</sup> die Aprilis, 1840.*

## MEMBERS PRESENT :

Mr. Wallace.  
Dr. Lushington.  
The Lord Advocate.  
Sir William Rae.

Sir Charles Grey.  
Dr. Stock.  
Mr. Ewart.

## THE HON. FOX MAULE IN THE CHAIR.

*Robert Bell, Esq., called in ; and further Examined.*

*Robert Bell, Esq.*

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2513. *Chairman.*] TO what do you attribute the defects which at present exist in the administration of justice in the courts, and the dissatisfaction which the public have expressed on that subject?—I attribute those defects, and the consequent dissatisfaction entertained by the public, more to the circumstance of sufficient time not having yet elapsed to admit of the present system being brought into full operation than to any defects in that system itself, or to neglect on the part of the judges of the court, who, as it appears to me, naturally, and perhaps unavoidably, abide to a considerable extent by a course of proceeding to which they have been trained, not only during their judicial life, but during their professional life while at the bar.

2514. *Mr. Wallace.*] Mr. Bell, I wish to refer you to certain questions answered by the Attorney-general, Sir John Campbell, when before the Law Commission in 1835 ; the questions are in the Appendix to the Second Report ; the question put to the Attorney-general was, first, “ Will you state whether you think the system of jurisdiction established in the Court of Session is expedient, by which the ordinaries (who judge in the first instance) are excluded from the inner house ; the court of review and the judges of the inner house having no share in the duties of the ordinaries ? ” The reply is, “ I would speak with peculiar diffidence upon that question ; but I can see various inconveniences arising from the present system of consigning the younger judges to the duties of lord ordinary, and then only having the seniors introduced into the inner house. ” Do you concur with or dissent from the opinion given by the Attorney-general ?—To answer that question generally, I say I do concur with the Attorney-general ; but to give you a definite and articulate answer to it would lead into very considerable speculation, which perhaps the Committee would not desire ; I concur generally in the answer.

2515. The next question is this, “ Does any peculiar reason occur to you for entertaining that opinion ? ” The answer is, “ One reason is this ; I speak of course most respectfully of the judges, and without knowing how the thing operates practically, but I should apprehend that one consequence would be, that the judges, by the time they come to be in the inner house, probably might not be in the vigour of their usefulness, and might consider that the inner house was a sort of pillow for them to repose upon. ” Do you agree with or disagree from that opinion ? —I certainly cannot say I concur in that opinion, as expressed ; of course the judges are older men after they have sat a certain number of years in the outer house : but it does not occur to me that they consider the inner house as a sort of pillow to repose upon. I have objections to the system on other grounds.

2516. Upon what other grounds ?—I think it is a disadvantage to a judge to be kept eight or ten years, probably, without hearing, except in very rare and important cases, the deliberations of his brethren, and having to trust to the information of reports, instead of being present at the decision ; and I think it is also a disadvantage that the judge should not have the opportunity of explaining the grounds of his judgment to the judges in the inner house, in the event of their lordships entertaining doubts of the propriety of what he has done.

2517. *Dr. Stock.*] Does it not frequently happen that the lord ordinary is called on to sit in judgment with one branch of the inner house ?—Not frequently ; he is not called on to sit in judgment with the inner house, except in those cases which the court think of sufficient importance to be heard before the whole 13 judges ; or in those cases in which, from temporary illness or other accidents, there is not a quorum of the court without calling him in.

2518. *Mr. Wallace.*] The next question is this, “ Do you see any disadvantage from their not being actually engaged in the court of review in reviewing those



those sentences which make the definitive sentence of the court?" The reply is, "That is a most serious inconvenience; because, upon any great question of Scotch law, it must be extremely desirable that all the judges should be assembled, and that their opinion should be taken." Do you disagree with that?—I concur in that; and I would add, in great and important cases there is a custom of having them heard before the whole court, or having them submitted in printed pleadings to the judges, so that they have an opportunity of giving their opinions.

2519. The next question is, "Do you think there is any disadvantage in the circumstance of a judge sitting 12 or 14 years without having an opportunity of bringing his mind in collision with any other judge?" The reply is, "I should think it most exceedingly to be deprecated; I should think the consequence of it must be extremely injurious." Do you concur in that opinion?—I think I have already expressed an opinion of my own, in accordance with that sentiment.

2520. The next question is this: "It has been stated that the judge in that situation has an opportunity of knowing the law, from the publication of the cases; do you think that that is in any degree equal to an actual collision with other minds?" The answer is, "By no means." Do you agree with that?—I think, it is certainly not equal to an actual collision; I concur, I mean to say, in that answer entirely.

2521. The next question is this, "Do you think the judgment is canvassed with equal freedom in the presence of a party, as it would be if he merely pronounced it, and left it to stand upon its own grounds?" The answer is, "I think it is very desirable that the judge who pronounces the original judgment should not be a member of the court of appeal; I have seen most serious inconveniences arise from that in England." Do you agree in that or dissent from it?—I do not know if I rightly understand the question, nor consequently the answer to it; but certainly it does not occur to me that judges in Scotland use any ceremony in giving their opinions in the presence of their brethren whose judgments they canvass.

2522. A great deal of evidence has been adduced before this Committee, with respect to the inconvenience arising from counsel being withdrawn from one bar to another, and upon that I am not about to repeat the evidence which has already been given, but I wish to call your attention to an existing act of sederunt of which, perhaps, you are not aware, but which I will now read, and take your opinion regarding it; it is that of the 11th of January 1604—[*The Honourable Member reads.*—Vide *Appendix* (H.)];—are you of opinion that such a regulation, if made now, would be beneficial to the suitors?—I should think not.

2523. Would it forward or retard the progress of the business of the courts?—I cannot well answer that question; I do not think our bar is numerous enough to admit of a division of that kind, nor the business of the country sufficient to hold out inducements to them to do it. I think there would be a disadvantage in having different men arguing the case, in what you may call the two different courts, the outer and the inner house. Very important views started in the outer house might escape the notice of the gentlemen who had afterwards to argue in the inner house, if they had not been present; I know of one case of great importance in which that occurred.

2524. The act of sederunt, which has been read, does not prohibit those gentlemen who are appointed in the inner house from practising in the outer house; it only orders and enacts that no delay shall take place in the outer house, because of the absence of those 15 gentlemen; is that the case?—I am aware of the act of sederunt, and, as I understand it, it prohibits those acting in the outer house from acting in the inner house.

2525. It allows them to act where they please, but says that there shall be no delay from their absence from the outer house?—I understand that, but I perceive the act of sederunt admits of two readings; my understanding was, that 15 only were to be permitted to act in the inner house; I may be mistaken in the meaning of the act.

2526. In either case you adhere to your opinion?—Yes, I do.

2527. On the same subject there is another section of the act, which is as follows; it is a message from the King, and is in the words—[*The Hon. Member reads.*—Vide *Appendix* (H.)];—do you think the adhering to this act of sederunt would be advantageous now-a-days?—It appears to me that what it prescribes is pretty much the practice at present; we have no chancellor, and the president, I believe, does not put out the roll himself, but it is done for him, and the practice of taking up a case that has been half heard very soon is observed at present.

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2528. The section that has been read makes it imperative on the court to give no delay, but to follow the case from one day to another, if it shall be put off; what the Committee wish to understand is, whether, in your opinion, it would be beneficial to adhere strictly to that practice now?—It would not be beneficial to adhere so rigidly to it as to incommode the court in the conduct of their other business, and, in point of fact, I think the rule is followed to as great an extent as it can be done conveniently.

2529. The next section is this, "That the said roll be affixed," &c. &c.—[*The Honourable Member reads the section.*—Vide *Appendix* (H.)];—do you think that a strict adherence to this rule would be advisable now-a-days?—There is a roll put out every day at present, which roll is continued from the roll of the day before, when any cases have been left unheard or half heard.

2530. Are not frequently a great many cases called on off that roll without any appearance being made?—That must happen when counsel are engaged elsewhere.

2531. In point of fact, it frequently does happen?—No doubt of it.

2532. Would a strict adherence to the rule now-a-days be beneficial or not, without paying any attention to counsel at all?—So far as I understand the section the Honourable Member has read, I think it is not only adhered to, but that the present rule of putting out a roll every week, and every day, is stricter than putting it out once a month.

2533. Are you of opinion it ought to be strictly adhered to, or the contrary?—I think the judges ought to have a roll of cases, and ought to take them up in the order in which they are put down in that roll, and, when a case is unavoidably postponed, then they should take it up as soon afterwards as can be done.

2534. Do you consider counsel being absent at other bars is a sufficient reason for a judge postponing the business of his court?—Certainly, except in very peculiar cases. I think the circumstance of counsel being at another bar is a reason for postponing cases to the next day, except in cases of what we call diligence, such as adjudications, which admit of no delay. The opposite practice of deciding cases in the absence of counsel would not tend to the despatch of business, for the party against whom it is decided would be entitled to move for a re-hearing, which would probably not be obtained for a month, and would cost much expense to both parties. The person who is in default in consequence of the absence of his counsel would have to pay a considerable part of the expense of his antagonist, but not the whole, so that it would lead to expense and delay on both sides; whereas, instead of getting the case taken up at the end of the month, and at some expense, it is probable that it would be taken up the next day, by its being postponed, or at all events a few days afterwards.

2535. Are the Committee to understand, in your opinion, the present mode of postponing cases, when counsel are absent, is not prejudicial to the business of the court?—I think it is not prejudicial to the business of the court, partly because it is always in the power of the party who is present to insist on having judgment if he pleases. If he chooses to take it on himself he may have judgment, but if he does not insist on it, I do not think the judge should be compelled to give it, and the counsel should be allowed to exercise their discretion whether they shall ask it or not. If both parties are absent, the judge can do nothing.

2536. The next and only section from the same act of sederunt applies to what has been said as to the proceedings of the inner house now-a-days; these are the words:—"Item, for despatch," &c. &c. [*The Honourable Member reads.*—Vide *Appendix* (H.)] If I understand you rightly, there is a similar mode of curtailing counsel in their arguments to what is referred to in the section of the act of sederunt; is that the tenor of the evidence?—No; I do not mean to say so; in a few rare cases, the court has a wish to have an argument on a particular point, and they will say so; but that is not the usual mode of conducting business.

2537. A great deal of evidence has been given as to interruptions and delays in the inner and outer houses, by what is alleged to be requiring from the judges of the courts to go through certain routine matters of form, which some of the witnesses who have appeared are of opinion would be beneficially removed from the judges, and could be placed in other hands; are you aware of any such routine in formal matters in the inner house which could be so beneficially disposed of with a view to the saving of the time of the judges?—It does not appear to me that matters of mere routine occupy a great portion of the time of the court; when it is a routine matter, with only one party appearing, involving matters of investigation—

investigation—into accounts, for instance, or other particulars, where there is no opposite party to put the court right, the practice at present is to remit that to a clerk or accountant, or some person to report to the court as to how the matter stands, so that I do not think there is much loss of time by mere routine matters; I do not think they occupy half an hour, or perhaps a quarter of an hour, in a day; and many of these are matters that would require the fiat of a judge after all.

2538. Are you of opinion, that in the inner chamber there are no matters of routine, no matters of course and of form, which could be beneficially removed from the judges?—There are matters of course in the inner house; and there may be some that could be done as well by other parties; but I do not think you would save 15 minutes in a day by it.

2539. As to the outer house, be kind enough to state whether you think the proceedings there could be simplified and shortened beneficially?—I think there are matters which could be managed by a judge at chambers; perhaps there are some matters which could be prepared for him by his clerk; but, generally speaking, I do not think there is much waste of time. It would be of considerable advantage as to particular points, that parties should meet a judge at chambers, rather than have the matters placed before him at the bar. Parties would probably come sooner to an adjustment of disputed matters of fact in the condescendences and answers, by some practice of that kind. I do not pretend to say that I have considered this matter recently, so far as to be quite certain that there may not be some opposite disadvantage.

2540. Sir C. Grey.] Do the two divisions of the inner house at present sit at the same time?—They do.

2541. Do the five lords ordinary sit at the same time with the two divisions of the inner house?—Four of the lords ordinary come out every day at nine o'clock; the divisions meet at eleven; so that for two hours a day the lords ordinary are there without the divisions. After eleven o'clock, they are all sitting at once.

2542. After eleven o'clock there are six different tribunals or divisions of the Court of Session sitting at the same time?—Yes, there are.

2543. Would it not be an improvement if one of the divisions of the inner house were to sit from nine until twelve, or from ten o'clock until one, and the other division of the inner house from one until four; that is to say, an improvement with reference to the convenient attendance of counsel?—I do not know whether it would be an advantage to the country, but I think it would be an inconvenience to the counsel.

2544. In what respect?—We do not conduct our business at chambers, as is done in England, where the counsel are near the courts, and can be sent for when wanted; in that way we would be under the necessity of attending from nine till four, and wasting a great deal of time.

2545. Would it not remove this part of the existing inconvenience complained of, namely, that, from business going on in so many courts at the same time, the counsel whom clients wish to engage cannot attend to the cases, they being employed in two or more causes which are being heard at the same time?—It might operate in that way; the objection I have stated is, that it would be very inconvenient to counsel.

2546. But would it not be a convenience to counsel in this respect, that they might be retained in cases in which they cannot be at present, from the several courts sitting at the same time?—I do not think it would make much difference in that respect; counsel would have less time to prepare their cases; but parties, it appears to me, would still press, as they do at present, for having the best counsel.

2547. But then the best counsel could always be had, whereas the witnesses have stated that at present the best counsel cannot be had, inasmuch as two or more causes are going on at the same time, and counsel cannot be in two places at the same time; what do you think upon that subject?—I am afraid that is an inconvenience that cannot be helped in a narrow country like Scotland, where the bar is small in number, and professional remuneration consequently smaller also.

2548. Would not such an arrangement, whatever inconvenience it might be, enable parties to have the actual attendance of eminent counsel more certainly than they have at present?—It might, to a certain extent.

2549. Would it not necessarily do so, inasmuch as they never would be prevented from being in a case by the circumstance of two courts sitting at the same

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time?—I dare say it would have that effect; I think it would have that effect but the suggestion is new to me.

2550. Would not the same effect be produced with respect to the business before the lords ordinary, to a certain extent, if two of the lords ordinary sat seven hours a day on the three days of the week, instead of four on each day; and if two other lords ordinary sat seven hours a day on the other three days of the week on alternate days, so that there should be only two lords ordinary sitting at the same time with the inner house instead of four?—It is difficult to answer that question; if you have two lords ordinary sitting seven hours, that is fourteen hours, if you have, as at present, four lords ordinary sitting five hours, that is twenty hours; they sit from nine till two.

2551. Would it not come nearly to the same thing, as to the amount of hours, if but two lords ordinary sat seven hours a day for three days a week instead of sitting four hours a day for four days?—Seven hours a day, for three days, are 21 hours a week; the other is 16 hours; it is a matter of calculation.

2552. It will have at least this effect, that there never would be more than three tribunals sitting at the same time, instead of there being six, as at present?—It would have that effect, certainly; whether the inconvenience to the practitioners which would be occasioned by it would be counterbalanced by the supposed benefit to the public, I am not prepared to say.

2553. *Dr. Stock.*] What is your opinion as to the effect of a rotation of cases before the lords ordinary, so that the parties should not have an absolute election, but that each case should go in its succession?—I have answered that question already; I think that the pursuer ought to have his choice of the lord ordinary, and I do not think that the public business would be expedited by a numerical division of cases.

2554. Do you not think despatch would be acquired?—I think not, unless you have judges of equal talents, equal industry, equal knowledge and equal quickness.

2555. *Mr. Wallace.*] It has been suggested, both to the Law Commissioners and also by several witnesses before this Committee, that it might be advantageous, with a view to prevent the inconvenience arising from the absence of counsel, that the two divisions of the inner house should sit upon alternate days; one sitting on Monday, Wednesday and Friday; the other sitting on Tuesday, Thursday and Saturday; can you convey to the Committee any opinion as to that proposal?—I do not know that more business would be done in that manner, and I do not know that the inconvenience felt at present is so great as to render it necessary; at the same time there can be no doubt that, while it would occasion additional inconvenience to counsel, the two courts would have the advantage of being less disturbed by the absence of counsel than at present; no doubt to that extent it would be an advantage.

2556. Does it occur to you that any inconvenience would arise from the adoption of that plan?—I think it would be a great inconvenience to the profession, both to the counsel, attornies and agents. Possibly that inconvenience ought to be suffered if it is for the public benefit; but the question is, whether the benefit the public would derive from it would be sufficient to compensate for the inconvenience.

2557. State in the first place what inconvenience you think would arise to counsel from the adoption of that plan?—It would require their attendance every day for a longer time than they find necessary at present, and they would have less time to study their cases.

2558. As to the agents, state what effect it would have upon them?—The same. Besides, if the system of oral pleading were once completely introduced, the judges would have little to do on the alternate days.

2559. *Mr. Ewart.*] Do you think it desirable that the judges should allow an interval between hearing counsel and giving judgment?—I stated, the last day of the sitting of the Committee, I thought it would be a great advantage if the judges were to hear counsel on one day and were to postpone their judgment to another.

2560. What do you consider would be the advantage of allowing an interim between hearing counsel and the delivery of judgment by the judges?—I think there is always a great advantage in a judge weighing deliberately in his own mind what he has heard, after hearing it; he gets quit of impressions that may be made by plausible statements or eloquent arguments, and he comes to pronounce a much calmer and sounder decision than when he gives it at the moment.

2561. Would it have the ultimate effect of rendering the judgments more final?—It would not; but I think it would render them much more satisfactory to the parties.

2562. You

2562. You do not think the additional deliberation which is implied, in allowing such interval to elapse, would tend to make the judgment more uniform and final?—I would not propose that the delay should be above a day or two; but a judgment whether well or ill considered is final. Perhaps the word “final” is used in a different sense from that in which I use it; all judgments are final.

2563. What I mean is, whether the decision is likely to have that more deliberate character which will prevent another question on the same point hereafter? Yes; I am of that opinion.

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*Martis, 14<sup>o</sup> die Aprilis, 1840.*

MEMBERS PRESENT :

Dr. Stock.  
Sir Charles Grey.  
Mr. Wallace.

Dr. Lushington.  
Mr. Ewart.  
Sir Robert Harry Inglis.

THE LORD ADVOCATE IN THE CHAIR.

*George Joseph Bell, Esq.*, called in ; and Examined.

*G. J. Bell, Esq.*

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2564. *Chairman.*] YOU are an advocate at the Scotch bar?—I am.

2565. And have been so for a good many years?—For more than 40 years; since the year 1791.

2566. You are Professor of the Law of Scotland in the University of Edinburgh?—I am.

2567. And one of the principal clerks of session?—Yes.

2568. You were a member of the Commission upon whose report the Act of 1825 was introduced?—Yes; in 1824, I think, the Commission sat.

2569. You were also a member of the commission in 1833?—Yes.

2570. And the chairman of that Commission?—I was.

2571. You are thoroughly acquainted with the provisions of the Act of 1825?—Yes, I think I recollect them.

2572. Of course as one of the persons upon whose suggestion that statute was brought in, and with reference to the inquiries of that Commission in 1833, and otherwise, you paid particular attention to its operation?—I did.

2573. In your opinion how has that statute operated; has it produced the full benefits that were anticipated from it; I should speak first with respect to the lord ordinary's duties?—It has not produced all the effect that was expected from it.

2574. Without considering now the preparation of causes, has the mode of hearing causes and deciding them in the outer house given general satisfaction?—In the outer house very great satisfaction.

2575. And from the commencement downwards?—Yes, I should say from the commencement downwards.

2576. You speak now of the hearing of and decision of the cases?—Yes; I understand I am to lay aside at present the preparation of the records.

2577. Has the same satisfaction been experienced in the hearing and decision of the causes in the inner house?—Certainly not.

2578. In neither division of the inner house?—I do not know as to the second division; I speak particularly of the first division; to which I have had occasion to attend officially.

2579. So far as you have heard in the profession, or have observed, should you say the same of the second division?—Very much the same; but I do not speak of my own knowledge as to the second division.

2580. That dissatisfaction was strongly expressed to you in evidence, and to the other Commissioners, in the years 1833 and 1834?—Yes; particularly by the Dean of Faculty it was expressed very strongly.

2581. You as the chairman, and your colleagues in that Commission, concurred in the representations so made?—Yes.

2582. To the extent of adopting what was said by the Dean of Faculty as the expression of your own opinion in your report?—It accorded with our own observation.

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2583. Has that dissatisfaction abated, or does it still continue?—I think there is entire satisfaction with the way in which cases are heard in the outer house; but dissatisfaction as to the way in which the causes are heard in the inner house.

2584. In your opinion does that dissatisfaction, expressed in 1833, still continue?—It still continues; and very much from the same causes.

2585. And from your knowledge of the profession, and your intercourse with the profession, do you think it is as great now as it was then?—Quite as much so.

2586. Would you have the goodness to state to the Committee what you consider the causes of that dissatisfaction with the hearing in the inner house?—That leads rather far back in the history of our proceedings.

2587. We should be glad to hear your statement?—I should say it begins with the way in which the very first part of the proceeding is taken. The defences, instead of being pleadings, are rhetorical; they are arguments stating the case in a rhetorical way: the consequence of that is, that the summons, which ought to be the foundation of the whole, is also framed after the same fashion; anticipating it. The defence, I think, is generally composed with two objects; one is to make an impression ultimately upon the judges of the inner house; another is to make an impression upon the friends of the parties, for it is printed, and so may be distributed, and is distributed frequently. That I think is the first error in the proceeding. Then the defender has the last word (as we say), in making his defence; notwithstanding which he has the power of insisting that the pursuer shall give in a condescendence, which he shall have an opportunity of answering. It is left for the parties to say whether they shall close the record, or whether they shall insist upon the record going further. Now, in making up this record, there is this essential vice in the whole proceeding, that it is made up for the purpose of producing an impression upon the judges of the inner house; and I have spoken with a great many of the counsel at the bar who are in the practice of preparing these records, and they say, that although they wish to make them proper pleas in the case, they have never been able to accomplish it, because the agents, who have an immediate communication with the clients, insist that, in order to make the necessary impression upon the judges of the inner house, the counsel must, under the semblance of a pleading in the case, make it an argument; and so the consequence is, that the condescendence and answers, instead of being pleas prepared in the cause, come to be covert arguments; the narrative is broken down into propositions, but still it is a narrative, containing truly what is an argument. This I think is the second error in the proceeding. Then this record is printed; it is perused by the judges of the inner house, and it is perused by them, together with an elaborate opinion by the judge who disposed of it in the outer house; that judge (instead of delivering his opinion from the bench, which I should humbly think to be the way in which a judicial opinion is always best delivered) writing out his argument, wasting time and delaying the case in some degree. That argument is written in the view of being printed. The cause then comes into the inner house with this argument, and the elaborate opinion of the judge, like a mill-stone about the neck of the party against whom it is pointed. The judges in the inner house cannot be without an impression made by the record, and this argument, generally a very elaborate one. Many of the Members of the Committee may have had an opportunity of seeing these arguments. When the case comes to be heard by the judges of the inner house, instead of being opened as a cause new to them, the advocate, to whom it belongs to speak in the inner house upon the occasion, argues against that opinion of the judge which has been perused by the judges. Not only is there an impression in the judges of the inner house in consequence of all this; but there is, what one cannot blame, a degree of unwillingness to the hearing of arguments against an impression already made; and particularly when addressed by a junior counsel. Without saying there is anything improper (very far from it), it is natural there should be a degree of impatience in the hearing of a cause by a judge who has perused the papers in his closet, and made up his mind in some degree upon the cause, while listening to a young man attacking his pre-conceived opinion. These I conceive to be the great causes of the dissatisfaction with the hearing of cases in the inner house. Sometimes it happens, and frequently, that the senior counsel is in the other division of the court; the junior counsel is by the regulation of the court ordered to proceed; but I have often heard junior counsel say, "My lord, I should be very glad to open this case, but

but my client is desirous, considering the nature of the argument against which he has to contend, that the senior counsel should be heard, and I beg that it may be delayed ;” and it is natural that it should be so. The junior counsel not only feel an unwillingness to undertake that responsibility, but they feel that they have a very arduous task to perform in contending against the written and authoritative argument of an eminent judge.

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2588. Some of these causes go to account for the circumstance of there not being a full *viva voce* discussion?—Very powerfully.

2589. Is not the cause of dissatisfaction the want of a full *viva voce* discussion, in whatever it originates?—Certainly it is ; and the want of it, I conceive, proceeds from these causes : I should say if a cause were opened in the inner house, and heard there (which from these circumstances it can scarcely be), as in the outer house, I should say that the dissatisfaction would almost entirely disappear ; I have not the least doubt of it, from the talents and knowledge of the judges.

2590. Without accounting for the reasons of it, is it your opinion that the *viva voce* discussion has been carried to its full extent in the inner house according to the real intendment of the statute of 1825?—Certainly not.

2591. In point of fact, in the ordinary run of cases, is the statement of the case from the bar such that a bystander, even a professional man, could well understand the case, and the bearings of the argument, and the decision of the judge, if he knew nothing of the case but what he might hear in court?—Certainly it is not ; and the consequence is, there is no attendance by the bar ; there is no bar attending, as in England ; there is scarcely any one not engaged in the cause ; no young man comes there to study his profession, from the way in which the case is argued. There are causes in which invaluable instruction is to be got from the opinions of the judges as delivered, and on those occasions the attendance of the bar is full ; but, speaking of the ordinary run of causes, when I wish any of my pupils to understand what is going on, I put into his hands the printed papers, which the judge has perused, and he is then able to understand it. There are particular cases which are taken *ab ovo*, as it were, which are too important to be taken in a short-hand way ; but in the general run of cases I feel it necessary to put the papers into the hands of a young man in whom I feel particularly interested, when I wish him to understand what is done in the case.

2592. Then the full hearing of a cause in the inner house, when it is fully opened and argued, is the exception rather than the rule?—It is the exception, certainly.

2593. Do you not consider it, as a lawyer, and a professor particularly, and an instructor in the law of Scotland, a very great misfortune that the courts do not furnish that school to the junior parts of the profession which it is desirable they should have?—I do, certainly ; to the bar and to the public it is a great evil, in so far as cases are opened and argued in the inner house : and although they are fully argued and heard in the outer house, there is no means of the bar attending there ; the cases are heard in a small chamber, half the size of this. I recollect the best lessons in the profession I ever got were from attending the bars of Lord Braxfield, Lord Esgrove and the late Lord Meadowbank. I do not think that the bar have now an opportunity of attending in the way they ought to have ; admirable arguments at the bar, and from the bench, are lost to the profession. I lament, too, that in the outer house the decision is not delivered from the bench. The judge takes the papers home, and writes out an elaborate judgment, which he does not deliver from the bench. It is generally printed, and may be read, but that is very different from hearing it spoken ; and, on the whole, that seems to me, in so far as regards the education of the profession, an unhappy course to be followed.

2594. Did Lord Braxfield deliver his opinion *viva voce*?—Yes.

2595. And at considerable length?—No, not at considerable length, because they were delivered very concisely, but very clearly concentrating the case, so as to be the very best lessons possible.

2596. Do you think, with reference to all your consideration of this matter, that there is any mode of hearing and disposing of a case that can give satisfaction either to the suitors, to the professional suitor, or the private suitor, or the public, except a full hearing in court, and an open decision, with a full expression of the grounds of the decision afterwards?—No, I do not.

2597. You do not think that any making up of an opinion upon private study ought to supersede a full argument in open court?—No.

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2598. Or



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2598. Or whether the judgment is right or wrong that it can accomplish that which is the great object of all judicial proceedings, namely, to satisfy the suitor that his case has been well heard?—Certainly not.

2599. You stated some circumstances which in your mind produce an indisposition, both in the bench and the bar, to give a full statement in argument in a number of cases; that is not the necessary consequence of those circumstances?—It is not perhaps a necessary consequence, but it is almost an invariable one.

2600. The practical consequence has been such that you conceive it to have a very bad effect upon the whole system?—I have no difficulty in saying so.

2601. Are you of opinion that it is very essential for the administration of justice in Scotland, and its due character, that that practice of imperfect *viva voce* discussion should be remedied and that a full *viva voce* discussion should be introduced?—Unquestionably; I think both the bar, the agents and the clients feel dissatisfaction; the person who loses the cause is dissatisfied, but sometimes, also, the person who gains is dissatisfied, from the way in which the case has been considered; he says, "I am not quite satisfied with the way in which this case has been gone through in the inner house; it will go to the House of Lords to a certainty."

2602. Can you state to the Committee at what time the written note was substituted by the lord ordinary for the expression of his opinion *viva voce*?—I do not recollect.

2603. It was shortly after the statute of 1825, I believe?—I think so.

2604. It began with short notes, and they gradually became longer?—Yes.

2605. Is it your opinion that the lords ordinary should not issue those notes, but express their opinions *viva voce*, and that the parties should have a shorthand note taken of them, and that they should be submitted to them for their revision?—Yes; I think that for the lord ordinary himself it would be better, as well as for the bar, and much more satisfactory to the parties. And permit me to add, that it would avoid what is a real injustice; a case going into the inner house with a very strong opinion one way, so that the judges have not the case to study from the beginning as if it were first opened before them.

2606. It is a principle in the courts in Scotland, that although they come in by a reclaiming note, a sort of appeal from the lord ordinary to the inner house, yet that the inner house takes up the cause as a new cause, and not with any predisposition in favour of the judgment?—Yes, that is the true principle; what was enjoined by the original Commission was, that in making the appeal to the inner house there should be nothing said in the way of argument, but a note merely stating that a certain judgment had been pronounced; that the record should be appended; and that with these materials the court should proceed in the hearing of the cause. That course has been neglected, and, I think, thus far the order of the Act of Parliament has been disobeyed.

2607. I gather then from this, that the inconvenience of the lord ordinary's note occurs in this way; you have nothing like an argument against the judgment, whereas you generally have a very able, and sometimes a very elaborate argument for it, and, at all events, of more authority, because it proceeds from a party who is supposed to be impartial in the cause, and no argument in answer to it?—That is the effect of it.

2608. Is it your opinion that those notes of the lord ordinary should not go in print to the judges, at least till after they hear the cause?—Yes; and my opinion would go a little further than that. My opinion is, that the judges should have nothing to read before they hear the cause; that if there is to be printing (which I consider bad in all respects), the record should be laid upon the bench before the judges sit down. That was very strongly expressed by the Dean of Faculty to the Commission, 1834, and we all concurred in it; you, sir, may have in your recollection that Mr. Jamieson and Mr. Skene, two of the most distinguished advocates then at the bar, were decidedly of that opinion.

2609. Was not this the ground upon which that opinion was formed, that we did not know how otherwise to secure in the inner house that full and patient hearing of the case from the outset, which we all wished to accomplish?—Yes, it was, certainly.

2610. And it was a general impression of the Commission, that taking the materials for their judgment that were sometimes furnished to the court, with these printed records, consisting primarily of statement, but in reality of much argument, and with this long and elaborate note of the lord ordinary, the bar did

did not in practice find it easy to obtain that full and patient hearing, without which there could be no satisfaction?—You state it very correctly; the idea of the Commission, very strongly impressed upon them by their own experience, was, that the construction of the statute fairly enjoined that the case should be heard from the first in the inner house, in the same way as in the outer; that the judges should have no preconceived notions; that they should take the case as a novelty, and hear it from the beginning, and deliver their judgment either at the time of hearing, in a simple case, or, more probably, reserve the case for consideration, and deliver judgment the next day; and, if I recollect well, one effect of that was expected to be, that the judges, deliberating before giving their judgment next day, would probably consult together, and that the judgment so delivered would be more authoritative, and the judgments of the court more uniform.

2611. Is it your opinion, that in the ordinary class of cases the judges are at sufficient pains to explain to the parties and the profession the grounds upon which their opinion is rested?—No, not in the ordinary class of cases; they do not seem to think it incumbent upon them to explain minutely to the satisfaction of the bar and the suitors the grounds upon which they have proceeded.

2612. The whole matter is managed in such a short-hand way, probably, between the senior counsel and the court, that though they understand each other, nothing is expressed in full that can adequately explain the grounds upon which the court proceed?—The opinions of the judges are delivered in such a way as to make what they say intelligible; but it seems to me not as an opinion for the purpose of instructing and satisfying the audience, but to express to each other or to the council in the case their views and grounds of judgment. In other cases of importance the argument is delivered in a more deliberate way, and more at length, presenting a full analysis of the case and a statement of the grounds upon which the opinion has been formed.

2613. Are you aware that it was very much wished at one time, and generally intended, that the opinion should not be given immediately after the hearing, but the next day, so that the judges might have an opportunity of consulting together?—Yes, that was much wished, and it is wished still.

2614. In point of fact, has it been much the course of practice to delay the decision for consultation?—No; that course has been taken occasionally; but at other times, when any difficulty has occurred, instead of taking time for deliberation, the court frequently orders what they call “minutes of debate,” which is a written argument.

2615. Cases are ordered also, but minutes of debate and cases are substantially the same thing?—Yes, in cases of great difficulty. Cases are ordered very like the cases in the House of Lords; but when difficulties arise in the deliberation, the judges say “This is a point which requires some consideration,” and instead of taking it to avizandum, they frequently order minutes of debate, which is a written argument.

2616. *Dr. Lushington.*] A written argument upon a shorter scale?—Yes.

2617. *Chairman.*] Shorter in theory, but not sometimes in fact?—They are generally arguments upon a particular point of the case on which a difficulty has arisen, in discussing which it is not necessary to go over the whole case; but I cannot help thinking that such argument would be better taken at the bar, and dealt with by the judges in court.

2618. Have you any idea of the quantity of time consumed by the court in its judicial sittings?—There was a return made of the time occupied: I think upon the average the time has been about two hours a day in the inner house.

2619. Some part of the time was occupied by routine business?—Yes, what is called incidental business. But the time of the judges at home is occupied in the reading of the papers in causes; which is a very laborious business if it is done fully, and which I am quite sure, from the time which I find it necessary to bestow in reading the cases in which I am to officiate as clerk, and as professor of law, must occupy the whole of their time at home.

2620. The time they sit in court is no criterion of the judicial labour bestowed upon a case?—No, certainly not. The mastery which the judges show of the contents of the record and appendixes demonstrates that long and arduous study at home must have been bestowed on the case.

2621. Is it your opinion that it would be a better system if there was more study given in public upon the hearing of counsel, even at the expense of some private study?—Yes, certainly; I would rather have them, previous to hearing the case, not read a word at home, and have the whole done in public; a judge

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never does so well for himself and the public as when he does his office in the hearing of the public.

2622. With reference to the present mode of carrying on business in Scotland, and what you may consider the essential constitution of the Court of Session, as the case is first heard before the lord ordinary who pronounces a judgment, and is then heard before the inner house; is it your opinion that the business of Scotland could be despatched with fewer inner houses than two?—I do not think it possible. I have thought of this very carefully. At first, struck with the inconvenience of senior counsel being engaged in one court when his presence was required in the other, I was inclined to hope that one court might be sufficient, but, on anxiously considering the matter, I found it hopeless and impracticable; I think that even at present, with all imperfections, one court could not get through the business; and if the system were improved there would be more causes, occupying more time.

2623. Do you think that any sound opinion could be formed upon the propriety of dispensing with one of the divisions until we have seen the change introduced by the Act of 1825 in full operation by an extended and satisfactory system of *vivâ voce* pleading in the inner house?—I should be inclined to say that an opinion may be formed in the negative, even as things are at present; The result of the improvements would, I think, confirm the opinion that you could not reduce the number of judges; I should expect more business, and therefore that the reduction would be still less advisable or practicable.

2624. Keeping the two divisions, is it your opinion that they should consist of any other number than four, either smaller or greater; could you reduce the number of four to three with advantage?—No, I think that extremely inexpedient; because, with the number of three, any accident befalling men at an advanced period of life would reduce the court to a very awkward dilemma, and stop business; instead of reducing the number to three, I should be very much inclined to say that the court might be augmented to five, in this way: that the lords ordinary, instead of being in what I consider a degraded position at present, should by rotation go into the inner house, and form a part of the deliberative body, augmenting the number of judges there to five; and though four is generally held to be the best number, I should say that five in that case was a preferable number.

2625. Five would expose you to the disadvantage of three adhering to the judgment of the lord ordinary in the outer house, because it might give you the decision of three and three in the one case, and two and two in the other, where the lord ordinary's judgment was right in the opinion of the majority?—With four judges there may be two and two, and so no decision; with five there must be a majority. But I am exceedingly desirous, at all hazards, that the judges in the outer house should assist in the deliberations of the inner house. The average time of a judge remaining in the outer house is 10 years, the best years of his life; he remains there 10 years without consulting the other judges, or seeing the progress they are making in their deliberative capacity; and I think it wholesome that he should be in some way adopted into the inner house, and take his seat along with the other judges.

2626. Do you think we could do with fewer outer-house judges than five?—No, I do not think we could; I think the incidental proceedings in the inner house had better be sent to the outer house.

2627. That time might be saved in the inner?—Yes.

2628. That is only a small portion of the time that is occupied now?—Yes, certainly; but still it does occupy time uselessly and more expensively than if conducted in the outer house.

2629. You have mentioned a good deal of defect in the preparation of causes, and that some complaints exist upon that subject?—Yes.

2630. Particularly with reference to the very frequent revisals of the condescence?—Yes.

2631. Which leads to great expense and great delay?—Yes, and leads to irregularity in the condescence and answers. Instead of improving, it is going retrograde; improving a little of late, no doubt, but very slowly and imperfectly.

2632. Have those causes of complaint been found very difficult of remedy, from the Act of 1825 having been so exceedingly stringent in the statutory rules?—Partly from that cause.

2633. And which has tied up the hands of the court from making acts of sederunt, which they might have done?—Yes; the rule laid down in the Act

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is better calculated for causes similar to those in the common law courts of England than to those similar to chancery cases. And I think, if the court had had power to accommodate itself a little more to the nature of those cases in making acts of *sederunt*, it might have produced considerable improvement.

2634. Have you observed whether the time of the sitting of the court has very much increased in length since 1825, as compared with the time before; has there been any palpable increase of the time of the sitting of the court?—No, I should say the reverse.

2635. And yet, since 1825, a great number of cases have been disposed of without any written or printed argument?—Yes; but formerly there was more time consumed in considering as to petitions, whether they stated such a case as to require an answer. Reclaiming notes require now no such description.

2636. Before 1825 cases were always disposed of with mere printed arguments?—Yes; a case came to the inner house against the judgment pronounced in the outer house with a full printed argument. And if that made a *primâ facie* case in the opinion of the judges, they appointed it to be answered. And the case thus printed, perused and studied, was the subject of the judgment of the court. The statute of 1825 was intended to abolish much of those printed arguments.

2637. And, notwithstanding that, the length of time occupied in court has not been very visibly increased?—I think the length of time is shorter; would you allow me to say, that my recollection is not very distinct as to the comparison of the time of sitting before and since 1825; but my impression is that it is shorter.

2638. Dr. *Lushington*.] You have stated that considerable dissatisfaction prevails at the mode of proceeding in the inner house; will you have the goodness to suggest to the Committee any thing that occurs to you as likely to remedy that inconvenience?—I should say, in the first place, that the judges should come to hear a case as if they knew nothing about it beforehand; they should not have laid before them for their previous study, or even upon the bench, the argument by the lord ordinary, prepared and printed; and that they should hear the case from the beginning opened before them, as it is in the outer house now. I think if the case were in that way opened before them, and they heard it deliberately, and decided, either delivering their opinions then, or afterwards upon study, it would be much more satisfactory, and entirely dissipate all dissatisfaction.

2639. Are you not of opinion that if the judges read the record before they came into court, including the note of the lord ordinary, and after that patiently heard the counsel at as full length as they pleased, and delivered their own judgments at sufficient length, that that would be the most satisfactory mode of disposing of the cause?—It might, but I cannot persuade myself to expect it. And perhaps if, in arguing a case, that impression be neglected which has already been made on a judge's mind who has already taken a particular view of the case, it may not very unnaturally happen that he will be inclined to interrupt a statement to ask what can be said upon that particular view of it. There may thus be a degree of impatience which it is difficult to control.

2640. Do you think that it is indispensably necessary to have a previous impression made up upon a case, because you have read the record in that case and the note of the lord ordinary; does it follow that a judge must have his mind made up and prejudiced against what he may hear, from that circumstance?—“Prejudiced” is rather an awkward word; but he cannot help having his opinion made up upon the case; he studies the case to form an opinion, and coming to hear the argument, it may very naturally happen that he should not hear it with all the patience he would bestow if his mind were open and the case entirely new to him.

2641. Do you not think that a judge, with a deep sense of the duty imposed upon him, seeing the judgment of the lord ordinary and the note appended thereto, would not feel the utmost possible anxiety that the counsel should suggest every possible argument to show that that judgment was erroneous, or the reasoning in the note fallacious?—I hope I should feel so myself; it is natural to feel so; but I do not see that that has been the course or habit of some judges.

2642. *Chairman*.] Your experience has not satisfied you that that has been the course?—No.

2643. Dr. *Lushington*.] After all, do not your suggestions come to this: that the judge should hear patiently all that comes before him, and decide deliberately?—Most unquestionably.

2644. And you do not undertake to say, if a judge were so to conduct himself,

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self, that his previous knowledge of the subject he is about to hear would prevent him arriving at a sound conclusion?—Certainly not.

2645. On the contrary, do you not think, having read the record and the note of the lord ordinary beforehand, he will more easily apprehend the arguments of counsel on both sides, and better detect the fallacies that may be put before him?—I should think the alternative to be, whether he should peruse the record before or after he hears the cause; if he were to peruse the record and the judgment of the lord ordinary after he has heard the cause opened, he would be able the next day to deliver his opinion with much more effect, and make it up with more discrimination.

2646. Would it not be his duty, having perused the record and heard the argument patiently, if he entertained any doubt of the state of the facts and the law, again to refer to the record, and examine it and compare it?—Yes, certainly.

2647. Do you not think it somewhat dangerously relaxes the important duties confided to a judge to say, that for the sake of a patient hearing of the argument, he is to abstain from reading the papers beforehand?—I am very much inclined to think so; but judging from experience and what I have seen, I should say that until other habits were acquired, it would not be dangerous for the Committee to discountenance the previous reading of those papers.

2648. In point of fact, are you not, from the observations you have made upon the present mode of hearing and deciding causes in the inner houses, induced to suggest this mode of proceeding for the object of attaining a patient hearing and a deliberate decision?—Any injunction that should accomplish that excellent object I should think well becoming the Committee; I can only say that at present, judging from my own experience, I should suggest that the judges ought not to read the papers beforehand.

2649. If you could insure a patient hearing and a deliberate decision, would you prohibit them reading the papers?—Certainly not.

2650. You have stated that some inconvenience has arisen in consequence of the court being so much restricted by the statute of 1825?—Yes.

2651. Allow me to ask you in what way you think that statute could be advantageously relaxed, with reference to the preparation of the record?—It is a little difficult for me to answer that question; there is very great difficulty in applying the strict rules of pleading proper for cases for a jury to cases that partake of a chancery character; now the statute is more directed to the one class of cases than the other, more directed to those cases that are fit for a jury court than to those analogous to chancery proceedings. It is a very difficult thing to say how the pleadings in such cases ought to be conducted; but I am afraid that amidst the difficulties of pleading such cases, according to the strict rule of the statute, a greater looseness of statement has been practised and acquiesced in, than if more power had been left in the judges to regulate the principles; that there has been a degree of restraint in the making up of these records from the way in which it is laid down in the statute that has not allowed the court to direct the way they ought to be made up as experience might have suggested in the progress of the new system.

2652. So that in some cases the latitude of statement is somewhat too much circumscribed by the statute, though not in others?—I think so; in some of those analogous to chancery cases it is necessary to state, in some degree, the evidence; in cases intended for jury trial it is proper to state only the pleas of the parties. In stating the evidence upon which the court is mainly to proceed in the former class of cases, I think there is frequently great propriety.

2653. You say a statement of the evidence; do you mean evidence with regard to written documents, or with regard to evidence to be taken from witnesses in some other mode?—Evidence from written documents.

2654. The great object in the preparation of the record, is to state clearly, and to bring to issue, the disputed facts and the disputed law; is it not?—Yes; it is, I should say, in jury cases. It is exclusively so, in cases of another description, very frequently the purpose is not to find out what is denied, but to obtain from the opposite party evidence by admission, in order to avoid the necessity of going to evidence upon it.

2655. Between the two litigant parties, there can only be a dispute between matters of fact and matters of law; therefore, it is desirable, in the outset of the cause, you should ascertain what is admitted as matter of fact between the parties, what is disputed as matter of fact between the parties, and the legal positions maintained

maintained on the one side and denied on the other?—Yes; but in cases analogous to chancery cases, you may compel something more than a single negative; as in bills of discovery in chancery in England; so by the matter of the record in Scotland.

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2656. Does not it happen rather frequently in some of the cases in the courts of Scotland, where no evidence is taken, and where the constat of facts consequently is to be drawn from the admissions in the answer to the condescendence, or in the statement of the other party, and the answer to their statement, that a clear constat of facts is not elicited?—Yes, it does certainly.

2657. Does not it occasionally happen, that when the division of the inner house come to pronounce their opinions upon such a case, in pronouncing those opinions they vary amongst themselves upon the statement of facts?—Very frequently so.

2658. Is not that one of the causes of dissatisfaction with the inner-house?—Yes, it is; but permit me to state, that it is not strictly so much a difference on the statement, as in drawing the inferences from the statement; the judges very frequently differ in the conclusions that they form from the statements made on the one side and the other.

2659. Undoubtedly; but does not it sometimes happen that they do not altogether agree as to the facts themselves?—In the Court of Chancery, as I understand it, you put interrogatories in order to bring out the evidence which the party is obliged to disclose. In our court there is a statement, to which an admission or a denial is expected. If it is denied it comes to issue. But if it is admitted it is not admitted directly, but only with a qualification. Instead of making an answer to the particular proposition, the party says, "Referring to my statement,"—then this statement comes to be almost an argumentative statement,—it is not a distinct answer as to an interrogatory, in point of fact, but an argumentative answer from which an inference may be drawn to the fact.

2660. And the facts are not always clearly and explicitly brought out?—No.

2661. I do not think that the Lord Advocate asked you whether you were or were not of opinion that the present number of lords ordinary was necessary for the performance of their duties?—I think it is necessary that there should be that number, on this account; that although lords ordinary are not attached to particular divisions, two may be taken as for one division and two for another, and another as intrusted with a vast quantity of miscellaneous and incidental business. The business of the court comprises all that in England occupies the Court of Chancery, the Vice Chancellor and the Master of the Rolls; the Courts of Queen's Bench, Common Pleas and Exchequer, the Court of Admiralty (with the exception of prize cases), the Court of Doctors Commons and the Court of Bankruptcy. The lords ordinary dispose of all this mass of business in the first instance; the inner house as a court of review. For disposing of this great extent of jurisdiction, after considering the matter in every possible view, I am satisfied that the two inner houses are necessary, and that two ordinaries to each division, and an ordinary for the supernumerary business, are absolutely requisite to keep the court going.

2662. And for the fair and reasonable despatch of the business incidental to the office of lord ordinary?—Yes.

2663. I understand you to have stated an objection to the note of the lord ordinary, on the ground that it may be an *ex-parte* argument, and produce an undue impression upon the division of the inner house to which it may come?—Yes.

2664. I do not apprehend you to rely upon that objection merely on the ground of its preventing a full and complete argument, as well as a perfectly impartial and unbiassed decision?—Not merely, but chiefly.

2665. Now, assuming that the lord ordinary issues a note in writing, containing at full length his view of the case, and the arguments and authorities that support that view, may not it happen, if such note is drawn up with ability and learning, that he makes the judgment so clear that there the cause ends?—Yes, certainly; that frequently happens.

2666. Is it not the natural effect to be expected from such deliberate notes of the judgment, that it will produce such a consequence?—Most certainly; but I do not know that it can do so more than if he were to deliver that opinion from the bench.

2667. Is it not a necessary effect that it tends to produce a confidence in, and an acquiescence in that judgment?—Yes, certainly.

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2668. So far it is beneficial, as it prevents further litigation occasionally?—Yes.

2669. You have said it would be better delivered *vivd voce* from the bench; do you see any objection to the lord ordinary putting his deliberate note into writing and then delivering it from the bench, with such alterations as may at the time suggest themselves to him, as necessary for a full and more complete judgment?—Not the least.

2670. Is there not some advantage in having that note in writing, inasmuch as it is an authentic record of the real grounds of the lord ordinary's decision?—Yes.

2671. And if you relied merely upon the short note that counsel or others might take, would not the inevitable consequence be, that there would be a long discussion in one of the divisions in the inner house, as to what were the grounds upon which the lord ordinary decided the case?—That might occasionally happen; but balancing it with the other disadvantages, I should say, with all the evils and imperfections of it, I should prefer that the judgment should be delivered from the bench; I have no objection that it should be written, but think it should not be communicated *à priori* to the judges.

2672. Are you not aware that it is the constant habit of those who preside in the House of Lords, to ask for the notes of the judges that they may be apprised of the grounds upon which they have come to their decision?—Yes, I am.

2673. If it is useful in the House of Lords reviewing the decision of the inner house, why should it not be useful in the inner house reviewing the judgment of the lord ordinary?—There is an advantage in having an authentic account of the opinion delivered; but observe how it is at present—that opinion is made up at home, it is never delivered from the bench, and the parties know nothing about it until they see it in writing.

2674. Assuming it to be delivered by the lord ordinary from the bench, not restricting him to the expressions written, but adding any corrections he thinks necessary, would it not be an advantage to have the judgment so delivered?—Yes.

2675. *Chairman.*] I understood your doubt not to be about the propriety of the lord ordinary giving, in the most authentic form, the reasons of his judgment, but about this, whether it should be put into the hands of the court before or after the full hearing of the counsel?—Yes.

2676. *Dr. Lushington.*] Did you not state that the defender had a right to require a condescence?—Yes.

2677. As a matter of right?—Yes.

2678. Do you think that that power ought to be taken away?—Yes, I think so; that is to say, I think it ought to be subjected to the opinion of a judge, or whoever is the person to superintend the preparation of the record, and not left entirely to the parties.

2679. Are you of opinion that the preparation of the record could with safety be withdrawn from judicial control?—No; but with safety and great advantage it might be put under the superintendence of a person able to superintend it according to principles laid down, such as a master in chancery; keeping to strict rules in making up the record. If the judge should not see it till he came to hear the cause, that would be preferable.

2680. Do you not think that the person to whom that duty was confided must possess great judicial attainments?—Yes, certainly.

2681. So that he would be in fact a judge under another name?—In some respects he would; but I do not think the preparation of the record the proper function of a judge. The lords ordinary at present really cannot, they have not time, and cannot control as they ought to do the making up of the records. Better they should be put into the hands of a person to act according to strict rules, and that those persons should report to the judge.

2682. In so important a matter as making up a record and getting a complete statement of facts, neither too jejune nor too exuberant, must not there constant occasions arise for the exercise of a grave discretion?—Yes; no doubt of it.

2683. Therefore the person to whom the duty would be confided ought to possess qualities as high as the lord ordinary?—Yes, I think so; but at the same time I do not see any difficulty in a barrister educating himself to pleading so as to be, under review of the lord ordinary, able to arrange all the points that arise in making up a record.

2684. Allow me to ask you whether you are of opinion that the time occupied by



by the judges could in any degree be satisfactorily shortened by enforcing to a greater extent the adoption of the jury system?—I think it might certainly; but the great difficulty is in enforcing an extension of that system.

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2685. Are you not of opinion that the jury system in civil cases is not congenial to the general feelings, habits and opinions of the people of Scotland?—As it has been hitherto conducted, it is not a favourite; there is great expense, and some degree of dissatisfaction at the way in which it has been administered; but I think that is giving way; I think by and by it will come right, and jury trial come to be a favourite in the country, when the law and practice of *viva voce* evidence is better understood.

2686. Are you not of opinion that it would be exceedingly dangerous, before public opinion has in some material degree paved the way, by legislative enactment, to compel the people of Scotland to resort to that system of trial?—Certainly. It would be dangerous and inexpedient.

2687. Is it advisable to adopt great changes in the trial of causes in a country unless the people are prepared to acquiesce in those changes?—Unquestionably not.

2688. Do you believe, upon the whole, that jury trial up to the present time has been pressed upon the people of Scotland to the utmost extent it was advisable to press it?—I think so; but that it may be recommended a little more to the feelings of the people of Scotland; not by compulsion, but by getting rid of some of the evils, and doing it gradually.

2689. Could you suggest any mode whereby the expense of jury trials could be materially diminished?—I certainly am not prepared to suggest that at present; I think that the expense in general is more than it ought to be, and the evidence greatly overloaded, but I am not prepared to say in what way it ought to be reduced.

2690. Sir C. Grey.] Is the written judgment of the lord ordinary drawn up before his decision is known, or the strong bias of his mind disclosed upon the case?—Yes; he may indicate the general bias of his opinion at the time the counsel have closed their argument; but whether he does so I do not know; Generally he takes home the papers upon which they have been arguing, and, after a private perusal of those papers, in four or five or six days, according to the nature of the case, he prepares his judgment, signs it, and delivers it over.

2691. Then in what material respect would it differ from the present practice if he was to read from the bench his written judgment?—In no other respect than this, that the judgment as delivered would be open to observations, and any mistake to correction; and that it would not then be printed for the perusal of the judges of the inner house.

2692. After the reading from the bench, whether copies were taken by his own clerk, or short-hand notes taken, would it not in the same way become known to the judges of the inner house, and be subject for their deliberation?—It would not be a part of the proceedings, and printed as such.

2693. Chairman.] You mean to say that it was better for the bar that it should be delivered publicly?—Yes.

2694. Sir C. Grey.] It would be known to the whole of the bar, and not only to the counsel employed?—Yes; besides giving the parties an opportunity of seeing he had mistaken no particular part of the case.

2695. Is there any practice in the Court of Session of making cases similar to the English special case, which is a case drawn up upon a perfect agreement between the parties as to the facts, and the statement of those facts in the most meagre form, with a careful exclusion of argument, and without any contention as to law, but leaving it to the superior tribunal to state upon those agreed facts what is the law that results from them?—That has been occasionally done in jury trials; where the parties, either before or after the jury have heard the evidence, being satisfied that they can distinctly state the facts admitted on both sides, make up special case for the opinion of the court. This however has very seldom occurred in our court; never but in a jury trial, as far as I know.

2696. Do you think that that practice might be usefully extended?—Yes, it might; but how you could compel it I do not know; you might recommend it.

2697. Is there any practice before the lords ordinary of making a decision subject to a point or points reserved?—No; there never has occurred any case that I recollect in which that has been done; the reserving of a point, which is a very common practice in the English courts, is not according to the practice of any of the courts of Scotland.

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2698. You are aware, even the Courts of Equity, which come nearer to the practice of the Court of Session than our Common Law and Nisi Prius Courts, that even there it is not unusual for the Chancellor either to make or intimate a decision, subject to a point, to be sent to a Common Law Court; not merely a fact sent to a jury, but a point of law sent to a Common Law Court?—That is not done in our courts, because the Courts of Common Law and Equity are combined in one; the judges then do not reserve a point as for a Common Law Court, but they deal with it as one of the elements of the case which they are to judge of.

2699. And, in point of fact, though the parties may only go upon a single point of law in the hearing before the lord ordinary, yet the whole case goes up in every instance to the inner house?—Yes, certainly; the whole of the case goes up; I do not recollect that I have ever found that the lord ordinary has so disposed of a case as to reserve for the court one particular point of law to form an element in the decision.

2700. Do you not think it must sometimes occur that the lord ordinary's decision is perfectly right, with the exception of one or two, or more, doubtful points?—Yes.

2701. Would it not tend to save trouble and expense if they could be so enucleated that they could give an opinion satisfactory to all parties, subject to certain points reserved?—Yes; I am satisfied that that would be beneficial.

2702. Dr. Stock.] You have mentioned that the judges in the inner house often decide cases without giving their reasons from the bench?—Not altogether without giving their reasons, but without giving them fully.

2703. Then it never happens that in any important case they pronounce a bare judgment, without assigning any reasons?—No, never: in important cases it is always done very fully and satisfactorily.

2704. Your attention was not drawn to the distinction that must arise in the practice of the judges deciding for or against the judgment of the lord ordinary; do you mean to apply your observation to both these cases indiscriminately; where the inner house differs with the lord ordinary is it then the custom for the inner house to enter at large into the reasons?—Yes, more so.

2705. You have been asked a great many questions for the purpose of establishing that it would be a better practice for the judges not to study the cases upon paper before they went into court; is it not your opinion that if the judges could go into court without any preparation by reading previously, and receive from the counsel full, perfect and complete information upon the cause, both in law and fact, and in the progress of the hearing make up their minds upon the merits of the cause, and so decide it, that that would be a better, more satisfactory and more wholesome method of arriving at a judicial conclusion?—Yes, unquestionably I think so; not to say that they shall immediately deliver their opinions, but that they shall do it immediately if a very clear case, or reserve it for a subsequent period, after deliberating with each other, in a difficult case.

2706. And that would let in collateral lights thrown out by the counsel?—Yes.

2707. And prevent the judge's ears being closed accidentally, or in any other way, to further argument?—Yes.

2708. Sir R. H. Inglis.] When you say that the system last suggested to you would be a more wholesome system of administering justice, and when you say, as you appear to say in your answer to an early question, that you thought that the judge ought to come into court as if he knew nothing of the case he was to try, does not your observation further imply, that in your opinion the judge ought to decide upon oral pleadings only, and that it would be a practical improvement upon the present system if the judge, instead of reading, either before or after the argument, the record and other papers, were to give his judgment upon hearing the oral pleadings?—I think that the judge should have the record either laid before him or referred to by counsel, and that he should, as English judges do, take his own note of the facts either as proved or admitted.

2709. Would the record in the case implied by your answer be any thing more than a bill of indictment or a declaration in an English court?—I think that it ought to be no more; at the same time I should not say so strictly, because a declaration applies to common law cases, and I do not know that you have any thing quite analogous to it in the Court of Chancery; a bill there is more loosely framed, as the answer also is.

2710. Did

2710. Did not your answer imply that there ought to be an entire change in the system of administering justice in the courts of Scotland?—I think so.

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2711. Are you prepared to leave the Committee with that impression, that you think there ought to be a fundamental change in the system of administering justice in the Supreme Court in Scotland?—A change in the mode of proceeding there ought to be.

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2712. *Chairman.*] In the mode of hearing causes?—I mean so.

2713. And carrying into full operation and effect the change that was begun and contemplated by the statute of 1825, proceeding upon the report of the previous Commission?—Yes.

2714. Mr. *Ewart.*] You do not mean entirely to do away with the present system, but intend to leave the judge to form an opinion upon the oral pleadings, having recourse afterwards to the record, if he thinks it necessary to do so; he may decide upon the hearing or upon the record placed before him subsequently?—Yes, certainly, that is my meaning and opinion.

2715. It does not imply a change in the Scotch system, but giving him an alternative he does not exercise at present?—Yes.

2716. Mr. *Wallace.*] You have spoken of the want of accommodation for the lords ordinary in the outer house?—Yes.

2717. Are not the courts they have inconvenient to the judges, the bar and the public?—Yes, certainly they are most inconvenient.

2718. Are not the inner houses exceedingly convenient and good courts?—Yes, certainly they are very convenient in respect to room, but I must say there is little attendance of the bar there.

2719. It has been stated frequently in evidence before this Committee, that the well-employed counsel at the bar now do not exceed 20 or 30 in number; may that small number be attributable to the way in which causes are heard in the inner house so as not to induce many of the young men to attend who otherwise would?—Yes, it may; I think if the causes were heard in the inner house fully, as in the outer house, there would be a great many young men who would more frequently attend and practice there, and the bar have a greater number of persons brought forward.

2720. And the number of employed counsel would necessarily increase?—Yes.

2721. You have given it as your opinion that a full *viva voce* hearing in the outer house, and a *viva voce* declaration of judgment by the lords ordinary, would be more satisfactory than the present mode?—That is not exactly what I have said; for I think that at present the hearing in the outer house is full and perfectly satisfactory.

2722. And the judgment?—I think it would be well if the judgment were delivered publicly.

2723. You are of opinion that the mode of delivering the judgment in the outer house is not so satisfactory as it might be?—All that I should wish is, that the opinion should be delivered from the bench in the hearing of the counsel and agents and the public.

2724. So far as you know, do the lords ordinary give out similar notes as to length?—No, some of them at much greater length than others; some give their opinion more concisely, and others more at large; some also with more anxiety, others less minutely, delivering the proposition they think the result of the whole, rather than a detailed argument.

2725. Are you of opinion that the character of those notes is similar from the different lords ordinary, as to being argumentative?—They are all argumentative; similar they cannot be; they partake of the character of the minds of the lords ordinary who produce them.

2726. You have stated your opinion to be favourable to the lords ordinary in some way or other being admissible to the deliberations in the inner chamber; have you any suggestion for the Committee in what way that could be effected?—I think it might be effected by the lords ordinary taking their turns in the inner house.

2727. Would that imply the inner-house judges also doing duty as lords ordinary?—Certainly not; whether it might be well I do not know; I apply my remark only to this, that the lord ordinary at present sits as a single judge, and never partakes of the deliberations of the court, and knows only from the printed report of the cases what the proceedings are; he would be well employed for

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himself, the profession and the public if he made part of the deliberative court, as well as sitting as a single judge.

2728. You have stated your opinion to be against the frequent revisal of the condescendence and answers?—Yes.

2729. Where does the fault lie at present in this practice?—The fault lies chiefly in this, that the parties have the power of refusing to close the record, as it is called; I think that that should be put under the superintendence of some person, either judicial or official.

2730. And that the closing the record should be imperative, instead of being, as at present, a matter of choice?—Yes, I think so; according to the judgment of the person selected as proper to superintend it.

2731. You have stated that the Judicature Act has not been carried fully into effect, consequently great dissatisfaction has followed; are you aware of any remonstrances having ever been made by the judges to any party with a view to have the imperfections and doubts of that Act removed?—I do not know that I have heard of any remonstrance by any of the judges.

2732. Were any remonstrances made by any of the parties to the Law Commission in 1833, of which you were chairman, with respect to the imperfections of that Act?—I think there were remonstrances made by professional men, and some opinions of judges upon the subject.

2733. Are you aware that an immense extent of litigation has taken place in settling doubtful points and matters of form arising out of the Judicature Act?—Yes, there have been many questions naturally arising from the entire change it produced in the manner of proceeding in the court; and a great many questions have arisen from the imperfect way in which the records are made up.

2734. Seeing that the judges of the Court of Session have such very large powers in framing acts of sederunt, might it not have been a very useful part of their duty to provide, as far as they could by acts of sederunt, against the consequences of the Judicature Act?—I am afraid that the words of the Judicature Act, which I struggled against very much at the time, are such as to prevent them from making any effectual regulation by an act of sederunt; it is imperative in the Act that the parties shall have the power of closing or not closing the record, and revising and re-revising their papers.

2735. Are you aware of any steps being taken by any party to procure an amendment of the Judicature Act?—I am not aware of any attempt, except the recommendations that have been made occasionally, both privately and also by the Commissioners in the First Report of the Law Commission. Some suggestions were there made for improving that part of the administration. They are not so perfect as I think they might have been, but I think they might have led to improvement.

2736. *Dr. Stock.*] What date was that report?—The First Report, in 1833.

2737. Did that suggest any improvement in the Judicature Act?—Improvement in the machinery,

2738. *Mr. Wallace.*] Has any effect been given to the recommendations in that report?—Not yet, as I understand it.

2739. Would it not be a great saving of the time of the judges if they were relieved from trying such innumerable questions upon points of form as have arisen since the Judicature Act was passed?—No doubt it would be a great relief; the question is, how it is to be accomplished.

2740. With regard to jury trial, you have stated your belief of it being likely to become more popular in Scotland?—I think so, and hope so.

2741. Are you of opinion that persons would be glad to resort to jury trial if it was made as cheap, as easy and simple as the mode of jury trial in criminal cases?—Yes, I think they would; but it is difficult to say how that is to be accomplished; it is a mode of trial entirely new in civil cases, and not easily engrafted upon the ancient mode of judicial proceeding in Scotland.

2742. Might not jury trial in civil cases be much assimilated to the mode of trying criminal cases?—In what respect do you mean, because it is not very distinct from it now?

2743. How do you account then for its unpopularity?—There is a much greater expense in preparation of the case for jury trial in civil cases than in criminal; a great part of the expense of the jury trial proceeds from the preparation of the case; and the anxious accumulation of witnesses. The expense too comes all in a heap, more oppressively than when it is called for in small payments and at intervals.

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2744. May not the great expense have arisen from engrafting it upon the Scotch system of practice in the Court of Session?—That I do not know; it is a difficult thing to answer; I do not know how you could have introduced it otherwise than by engrafting it upon the system of Scotland; it has been introduced with some imitations of English process, which have not been very much liked in Scotland,—the unanimity of juries, for example.

2745. You have alluded to considerable impatience exhibited in the hearing of causes in the inner house; is that impatience expressed, or is it rather to be implied from the conduct of the judges on the bench?—The degree of impatience of which I speak is an unwillingness to hear the case from the beginning; and rather directing the argument of counsel to particular points.

2746. I believe the Court of Session does not sit upon Mondays?—No.

2747. Is there any reason to be assigned for that?—That is the only day on which there are justiciary trials, criminal trials, which are conducted, you are aware, by the same judges.

2748. The justiciary judges amount to six in number, do they not?—Yes, six I believe, and with the Lord Justice General there are seven.

2749. I believe it is not customary to proceed with any other business on the days on which teind courts are held, after the business of that court is over?—That time is generally appropriated to the consultations of the judges.

2750. And in that way conveniently applied?—Yes, I think conveniently applied; those consultations sometimes interfere with the business of the court in a very inconvenient way upon other days.

2751. Strong opinions have been stated to this Committee in favour of reducing the judges in number from 13 to 9, with the view of having one of the inner divisions only; have you any opinion to express respecting that proposal?—I have already said that I do not think that one single court could do the business of the country.

2752. One reason assigned for desiring to have but one court of review, is obtaining more uniformity in decisions than is now the case; would the abolishing one of those courts have that effect, in your opinion?—There certainly could be no difference of opinion between two courts if there was only one; and the possible difference of division in two courts is one cause of want of uniformity of decision.

2753. It has been alleged, that the frequency of appeals to the House of Lords arises to a certain extent from the discrepancy of the decisions of the two courts of review; have you any opinion upon that subject?—There is a mode in the administration of justice in Scotland by which that can be provided against: whether it be enough adopted is another affair; but the two courts are enabled to combine their judgment on any question of difficulty, by the opinions of the whole of the judges being taken, which is almost in the nature of a court of review. You observe, in Scotland we have no means of immediately representing the judges in the House of Lords; the judges may however combine in one united judgment for reconciling any of those discrepancies which may appear in the general administration.

2754. Mr. *Ewart*.] Though they may combine, there are cases where discrepancies have arisen between the two inner divisions?—Yes, there have been decisions given by the two courts differing from each other.

2755. *Chairman*.] That has not been very frequent as regards principle?—No.

2756. Mr. *Wallace*.] Are you of opinion, that two courts of review are more likely to create appeals to the House of Lords than if there was but one?—I should think there is a double chance so far; but then comes the question of the possibility of doing with one court; if you could accomplish the business by one court, there would probably be less necessity for appealing; but then I think the thing is impossible.

2757. Do you think it impossible for one court of review to overtake the business, supposing the daily sittings were to be from ten o'clock to four, and the sessions to be extended to eight or nine months in the year?—I think it impossible, in this way; as the business is conducted at present, and while the judges study the cases in the careful way they do at present, the study at home extends as far as it is possible to push it. If they heard the cases out in the court, I think from ten to four would not be more than absolutely necessary for dealing with the cases that came before them; I think, indeed, they would scarcely have time to accomplish it.

2758. For both courts?—Yes.

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2759. I understood

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2759. I understood you to say that you disapproved of the judges studying so much at home?—Yes, certainly; that previous study which occupies them so long a time at home with some disadvantage.

2760. Then in what way do they require so long a time as your last reply alludes to?—The time occupied is not in court, but they have to read an infinite quantity, and which, I believe, they do very zealously at home; and it is impossible to task human intellect beyond a certain point.

2761. *Chairman.*] I understood you not to disapprove of private study to any extent, but to disapprove of any system that made that private study supersede the hearing in court?—Certainly, that is my meaning.

2762. *Mr. Wallace.*] Then, in your estimation, the judges would require to study as much at home as they have hitherto done, though they may devote a great deal more time in open court?—No; and so far from that I think it would be the very reverse; if more time was occupied in hearing the case in court, there would not be much occasion to study at home; they would then have only to verify the points; but at present they have to make out the case from the beginning, to study it from beginning to end, and make up their opinion upon it, which I believe they do very carefully.

2763. Then it is your opinion, that, if the mode that you suggest were adopted, they would not have much reading at home?—They might have a great deal of reading at home, but not so much as at present.

2764. You think that one court of review could not overtake the business with the sittings specified?—No.

2765. Can you state how many judges sit in the Court of Exchequer?—I think two judges, by the late statute, are authorized to sit in the Exchequer Court.

2766. Those are Lord Cuninghame and Lord Jeffrey, I believe?—I do not know; by the statute they go in rotation.

2767. The two judges who have by far the heaviest duty imposed upon them as lords ordinary are called upon to do the duty of the Court of Exchequer also?—You assume that they are the judges who have the most business imposed upon them, and that for that reason they are so called on.

2768. It is in evidence, that Lord Cuninghame has had 667 causes put upon his roll during the last session, out of 1,801, being considerably more than one-third of the roll belonging to the five courts of the five lords ordinary; and Lord Jeffrey has had more than 400 put upon his roll; so that those two judges are by far the heaviest loaded with the duties of lords ordinary. Now, as a person thoroughly acquainted with the question, I wish to inquire if it appears to you a reasonable mode of employing those judges, to give them the duty of Exchequer judges besides?—The concurrence of causes to one particular judge is from the supposed superiority of that judge in the judicial administration. Now, as to the giving the business of the Exchequer to one judge more than another, I believe that goes by rotation; whether it may light upon a judge with more or less business is another affair; but unquestionably if the public find that one judge is overloaded, they have it in their power to go to another judge.

2769. I wish to inquire whether, in your opinion, with your knowledge of the court for so many years, you consider it a proper mode of apportioning the duties of the judges, to place the duty of the Exchequer Court upon the two judges in the outer house who have the heaviest roll?—I am not aware that that duty is intentionally imposed upon the judges who have the greater quantity of judicial business to do; as I understand it, the rotation goes in a particular way; where it may fall I do not know; that is accidental. As to the concurrence of causes before a particular judge, that is left to the parties themselves; they may go before one judge or before another, and whether there may be a concurrence of business in the Exchequer with the civil administration in the outer house, seems to be a matter of mere accident.

2770. *Chairman.*] You are aware that Lord Cockburn and Lord Moncrieff have the business of the Court of Justiciary upon their shoulders?—Yes.

2771. Is that much heavier than the Court of Exchequer?—Very much heavier.

2772. And in respect of having the business of the Court of Justiciary, they do not take the business of the Exchequer in their turn at all?—No, I believe not.

2773. The business of the Exchequer is performed by two judges of the six, who have not the business of the Justiciary to attend to?—Yes; and the business of the Exchequer is not a very heavy business.

2774. *Mr.*

2774. Mr. Wallace.] Can you state how the business of the Exchequer is apportioned; is it by act of sederunt, or by Act of Parliament?—By Act of Parliament, the 2d and 3d of the Queen, I think; chapter 114 or 119, I do not recollect which.

2775. Are you aware of the very heavy arrear that some of the lords ordinary have?—Yes, I am.

2776. And that Lord Cuninghame, Lord Jeffrey and Lord Moncrieff have the heaviest arrear; are you aware of that fact?—Yes.

2777. And that those three judges are called upon to sit in the Justiciary Court and the Exchequer Court, whilst there are other three judges who do not sit in either of those courts, namely, the Lord President, Lord Gillies and Lord Fullerton; does that appear to you to be a wise division of the labour of the court?—As to the rotation I do not know; I have not attended particularly to that, but that the Lord President, Lord Gillies and Lord Fullerton do not sit in the Justiciary and Exchequer, is true; that Lord Moncrieff has the Justiciary, and Lord Cuninghame and Lord Jeffrey have the Exchequer business, is true; how the arrangement ought to be made, I do not know.

2778. Mr. Ewart.] If I understand you right, it is in the power of the parties to spin out what you call the record in Scotland, and what we call the pleadings in England, by this system of raising inferences in supposed admissions of the parties, and that it is the parties in the cause who have the power to continue this system of lengthening the record as long as they please?—Yes; they may require that they shall be enabled to revise and re-revise, and alter their statements, and the lord ordinary has little power to control them.

2779. You think that a general controlling power should be exercised by the judges?—Yes.

2780. Have they not the power of doing it by act of sederunt?—No; they have no power of controlling the will of the parties in making up the record; unfortunately the Judicature Act, with respect to the closing the record or not, left it to the parties.

2781. And therefore you think that a power should be given to the judges to exercise their judicial functions over the pleadings?—Yes.

2782. Mr. Wallace.] Does your opinion go to this, that the Judicature Act should be repealed, and another Act substituted?—No; I think that the Judicature Act has done a great deal of good; there are some blots in it; there can be hardly any Act without it, especially in establishing a new system of judicial proceeding. But frequent changes produce great evil and inconvenience.

2783. Chairman.] The complaint is that the Act has not been carried out so fully as it ought to have been?—Yes.

2784. Mr. Wallace.] Can it be carried out without legislative interference?—I believe it requires some aid from the Legislature.

The Solicitor-General of Scotland called in; and Examined.

2785. Chairman.] YOU are Solicitor-General of Scotland?—I am.

2786. And have been for some time at the Scotch bar?—Since 1816.

2787. And latterly in very extensive practice?—Considerable.

2788. You are aware of the change that was introduced into the system of pleading in Scotland in 1825 by what was commonly called the Judicature Act?—I am.

2789. Will you state shortly the main object of that change?—The object, generally speaking, was to do away with the abuse which had been felt to prevail from the excess of written pleadings.

2790. To substitute for written pleadings *viva voce* pleadings?—Just so.

2791. Is it your opinion that the change of system introduced by the statute, in so far as causes are heard and decided by the lords ordinary, has given satisfaction?—So far as regards the hearing and deciding by the lords ordinary, it has given complete satisfaction.

2792. From the commencement down to the present time?—Almost entirely.

2793. There are complaints made against the system, I believe, connected with the preparation of the record?—Yes; but the causes of complaint, though they still exist to a certain extent, are gradually diminishing.

2794. But with respect to the hearing and decision of causes before the lords ordinary, that complaint does not exist?—It does not.



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2795. That satisfaction with the system before the lords ordinary has been general with the parties, the profession and the public?—With all classes.

2796. Has the same satisfaction been felt with the operation of that system in the two divisions of the inner house?—Certainly not as regards the measure of hearing that is given to causes before the court.

2797. You are aware of the expression of opinion upon the subject contained in the report of the Law Commission in 1833?—Yes.

2798. By the Commissioners themselves, as well as with reference to the evidence before them?—Yes.

2799. Did that expression of opinion happen to coincide with your opinion at that time?—Entirely so; and I should say it coincided universally with the opinion of the profession.

2800. Is it your opinion that the same feeling of dissatisfaction still exists?—There is dissatisfaction still, though, as the evil that is the cause of it has been progressively giving way, it certainly does not exist to so great an extent as at first.

2801. But to a considerable extent?—Yes.

2802. And about as general?—About as general.

2803. In what respect is that dissatisfaction most felt?—In the unfavourable contrast, I think, which the mode of hearing practised in the inner house presents to that which is to be found in all the other stages of the judicial treatment of a cause; for example, in the outer house the cause is very fully heard before the lord ordinary, and the parties as well as the profession are satisfied that justice is done, so entirely so, that I scarce recollect an instance where, from the impression that every point had received the most anxious and deliberate consideration, the result did not give satisfaction, whether against or in favour of the party. So, again, in the House of Lords, where the same full mode of hearing is practised, there is the same entire satisfaction with the course and the result of the proceedings. Whereas, in the inner house (which without any real cause for the difference, stands alone in this respect), the course of proceeding is so entirely different, there is comparatively so little opportunity given for a full and deliberate discussion and consideration of the cause, that there is, and most justly, a very great degree of public dissatisfaction. This dissatisfaction, perhaps, exists less in the profession, because the profession know, that the work, although not done after the most satisfactory manner, or so as naturally to create a feeling of confidence in the public mind, is yet—between the labour which the judges bestow upon the cases in their perusal and study of the written pleadings at home, and the additional information which, by means of this previous preparation, they are more readily enabled to take up in court—so performed in the whole matter, that at least for the most part the ends of justice are substantially satisfied. This, however, implies a confidence in the judges, which, in the absence of all open check upon the due and full discharge of their duties, as it is only to be had in a system which enforces the execution of a larger portion of the judicial functions, in face of the public, is scarcely to be looked for out of the profession. Accordingly, while the profession (having greater confidence in the judges, because from their professional opportunities they see that there are means taken, though not so perfectly taken, for attaining the ends of justice) are comparatively less dissatisfied, and the dissatisfaction which is of a more popular kind is greater than, perhaps, circumstances would justify when fairly considered in all points of view; still, all concerned remain, I think, of opinion that a great and serious evil does exist, and that, under the present system, it has not yet received its remedy. In the end, however, there seems no reason to doubt, that, as the habits of both the bar and the bench improve, a remedy will be found, though a considerable time may be occupied in so material a change before the evil shall be done away with altogether. Already, indeed, there has been a constant progression towards amendment, and I have no doubt, in the course of time, the evil will cease of itself, if better habits are induced. Although it scarcely falls within the scope of the question, I may perhaps be allowed to add, that one very grave consequence of the present imperfect system of hearing is, that the profession is left almost entirely without a legal school. I cannot better explain what I now refer to than by quoting the words of a pamphlet recently published in the shape of a letter addressed to the Chairman of this Committee, where the whole subject of the present inquiry is discussed with great intelligence, and in a spirit of the most perfect

perfect fairness and moderation : “ It is one of the great objections,” remarks this writer, “ to the procedure of the inner house, that the public can rarely know what it is about. Nay, even the profession are nearly as ignorant as the public ; for, unless a practitioner reads the record beforehand (and if he is not concerned with the case he can have no access to the record), he can but ill comprehend what is the real question from any thing that takes place at the bar. The pleadings and the speeches from the bench all proceed in the notion that the case is perfectly well known to every one ; accordingly, a stranger may pass days in the court without having a conjecture of what is really going on.” And again, as to the outer house, the same evil is traced to a different cause : “ The chambers in which the outer house business is transacted are considerably less than ordinary bed-rooms ; there is literally not accommodation in these apartments for six persons beyond the counsel and agents concerned. Is this fair to the suitors or to the public ? Is it fair to the profession ? By what means is a young gentleman to acquire a knowledge of his profession, before being called to the bar ? The principle is, moreover, exceedingly bad ; it is neither conducive to the patient and vigilant discharge of his duty by the judge, nor to the independence of the bar. It is one striking advantage of the English system of administration, that, being perfectly intelligible throughout, the judges are constantly attended by a numerous bar. In Scotland such attendance is impossible before the lords ordinary, when the bar might really be instructed ; before the inner house there is scarcely any attendance beyond the parties concerned, because little instruction can be derived ; it would have been infinitely better for the bench and the bar had the practice been wholly different. For the last five or six years I cannot charge my memory with a single instance in which any one professional person, counsel or agent, has attended the discussion of a case in the outer house, in which he was not immediately employed.”

2804. You are not prepared to suggest any legislative remedy ?—I do not see how any legislative remedy can avail ; it is not so much by any change of system, as by that improved working of the system which we already have, that the evil is to be cured ; and this is to be done solely by those in judicial situations encouraging and giving effect to the necessary amendments on the existing practice.

2805. With reference to the want of a full and complete *viva voce* pleading in the inner house, which is obtained before the lord ordinary on the one hand, and the House of Lords on the other ?—Precisely so.

2806. Do the judges deliver, in your mind, with sufficient fulness in ordinary cases, the grounds and reasons upon which their opinion is formed ?—I should say not, certainly ; though here, too, I must add, that an improvement is taking place, and has been advancing with greater rapidity in later years. I attribute this to the introduction into the inner house of new judges from the outer house, after they have been there accustomed and trained up to a better mode of performing the judicial duties there.

2807. Trained to the habit of hearing the cause argued fully ?—Yes.

2808. Do you think, with reference to the present amount of business before the Court of Session, particularly if that fuller hearing were obtained and given in the inner house, the want of which you say is felt, that one division could do the business of the country as an inner house ?—I should think that, at present, a hazardous experiment ; for, though there has been, perhaps, a decrease in the business of the court to a certain extent of late years, it may be doubted whether this is to be traced to temporary or permanent causes. Besides, so long as it remains to be seen what additional time will require to be occupied in court, when the chief part of the judicial duty shall be there performed in the face of the public, it would be difficult to say, whether, even with the existing extent of business, a single division would be enough. Hereafter, if it shall be found that the decrease of business is permanent, and if, after all those improvements in the practice of the court, which ought undoubtedly to be made before you alter the constitution of the court, it shall eventually turn out that there is so much time unoccupied in the public service as to enable you to do with fewer judges,—then, perhaps, the experiment may be tried. But I should say decidedly the reverse at present.

2809. In your opinion there are no grounds upon which you could come to a satisfactory conclusion, that you could do with one division instead of two in the inner house ?—Yes, that is my opinion ; I cannot express it too strongly.

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2810. That

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2810. That opinion you give with reference to the greater time spent in court? —Yes; there is at present too little time spent in court. But, if we were to judge of the judicial labour merely from the time spent in court, it would certainly be impossible to avoid the conclusion that one division could do the whole business. Nothing, however, could, in my opinion, be more fallacious than such a view of the matter. By far the greater part of a judge's time at present, if he perform his duties as he ought, must be taken up by reading and study at home; but if his functions are, as I think they ought, to be performed less at home and more in court, then necessarily the time spent in court must be very greatly increased. Knowing from my own experience what the labour is, to a counsel, of reading the papers, even in those causes where he is himself employed, I am satisfied that a judge, who has to deal with all the causes that come before the court, must, in giving the necessary study and attention to the printed pleadings, which, to enable him to pronounce judgment, he must do with still greater deliberation and anxiety than even the counsel who has to plead the cause, have both his time and his mind still more severely taxed. Assuming, therefore, that all this measure of duty must be performed by the judges, either in or out of court, if a judge should give that deliberation, and still more decidedly, upon a case than a counsel is called upon to do, and which judge has all the causes to deal with, I cannot conceive, that one division only should be able to deal with the business as they ought, or that their decisions pronounced under such unfavourable circumstances should give satisfaction to any one.

2811. It is with reference to the satisfaction to the parties you wish for a fuller hearing in the inner houses?—More so certainly than to any thing else, because it is one of the chief elements of the usefulness of our tribunals, that those who resort to them should be satisfied; and, besides, it may be doubted whether, without the check of a full and deliberate public discussion, either judges or any others concerned will bestow the same ample attention in the discharge of their respective duties as when they are made to give public expression to their views, and so to satisfy the public, by what passes before the face of that public, that the necessary attention has been given.

2812. Then, in your opinion, do you think that the system of 1825 has been carried to the full extent of which it is susceptible, and to which you wish to see it brought?—I do not think so; and so very large a change upon a previous system of things so totally differing in character was hardly to be expected to receive its full operation without many hitches being felt in its progress. There have been, moreover, many circumstances to retard it, but these, I think, are now rapidly falling away, and I anticipate (at least if we are left alone to mature one system before we are set upon another) that matters will proceed favourably towards amendment. In the introduction of any great change, more especially a sudden change of the whole practice of the judicatures of a country, by force of statutory enactment, there cannot fail to arise numberless incidental difficulties and discussions, most expensive and most troublesome to litigants, and of course naturally causing considerable dissatisfaction, before the new system can be expected to settle down into any thing like consistency. Under the late change we have nearly got over this stage, and it is exceedingly desirable that time should be allowed to do the rest; any acceleration proceeding from legislative interference I should strongly deprecate; its tendency would in fact be just to re-open many of those incidental questions which we have just got disposed of, and to expose us to a renewal of all the difficulties naturally springing out of the construction and working of the new enactments.

2813. To what causes do you attribute the want of a full hearing in the inner houses?—I think they are to be found partly with the bench and partly with the bar. Before 1825 the system of pleading was almost exclusively written. The judges were thus necessarily driven to prepare themselves upon those written pleadings before they went into court; and the bar, who knew the labour they had, in this way, been obliged to bestow, naturally did not anticipate that any oral observations subsequently made should have much effect, and, accordingly except in very important cases, it was desultory observations that were addressed to the bench. Since the system of oral to the comparative exclusion of written pleading was introduced in 1825, there has been a change, and if that system had been thoroughly given effect to, I should have anticipated as great a change in the practice, as the statute was meant to operate in principle. But old minds do not yield to change so readily; and in this respect the bar, who more or less

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continued the old and defective system of oral pleading in the inner house, have to bear a portion of the blame. As it is, the evil is one of habit rather than an unwillingness to hear; it is an involuntary adherence to an old system by those whose habits have been formed under that system. Every year, however, I think that a gradually progressive improvement may be traced, and, at this moment, the evil is not so great as to make me hesitate in saying you will soon have all that can be desired. In the meantime you have put new wine into old bottles, and I am afraid some of the evils that attend such a course have been experienced.

2814. In comparing the divisions, do you think that they could be beneficially reduced in the number of judges?—No; I think, in point of principle, it is well to have a court that shall consist of an even number, to give due weight to the decision by the necessary preponderance in point of number that is thus secured, before a decision can be come to at all. Besides, seeing that the inner house is a court of review, I think it is almost indispensable that we should not, by constituting it of an uneven number, enable a bare majority of one in the inner house to overturn a judgment of the lord ordinary, thus (taking the outer and inner house together) giving as many judges against as for the decision. Finally, I think an even number most desirable, as securing wherever there is an equal number in the inner house, the necessity of a consultation with the whole court. Assuming there is to be an even number, it does not appear to me at all advisable that that number should be less than four.

2815. Do you think that the number of ordinaries in the outer house could be reduced without injury to the administration of justice?—I do not think it could; at present several of the ordinaries, as it is, are very greatly in arrear.

2816. Suppose the work before the three ordinaries who have most work upon their hands were distributed equally, do you think that the ordinaries are more than sufficient to work off that arrear, and do the general business of the country?—I do not think that it could be safely tried to reduce the number. You must always leave a certain margin for the preference, which, do what you may, will occasionally be shown to some judges over others.

2817. From a popular preference?—Yes; and the greater aptitude which one judge will frequently be supposed to possess, as compared with others, for disposing of peculiar classes of causes. In this way, reduce the number of the judges as you may, some will be overloaded and others not. In point of principle, I should not approve of any system which deprived the public of this power of selection; and it would be short-sighted and unwise,—to say nothing of its being unworthy, for any little pecuniary saving that could be expected,—to reduce your judicial establishments absolutely to the very *minimum* of which they could possibly be made to consist, supposing that all the judges are equally perfect, and that each had his equal portion of work doled out to him: besides, it would not be found easy in practice to make such an equal distribution of judicial labour. Assuredly, where one cause involves frequently an hundred times the difficulty of another, it could not be done by any attempt at distribution by the number of causes.

2818. You are aware of various remedies suggested at different times for the purpose of enforcing a full hearing upon the inner house, such as the not giving the record to the judges?—Yes.

2819. And other remedies to insure a fuller opinion, and more matured opinion, such as declaring that they should not give an opinion upon the day on which the cause was heard?—Yes.

2820. Is it your opinion that any of those remedies were well calculated for the end in view?—I should not like to see any of these remedies laid down as a rigorous rule by legislative enactment; I had rather see the matter left in the hands of the court, not doubting that, as time and practice improve the judicial manner and habits, no mode in which the judges themselves feel that their minds are best prepared for the due exercise of their high and important functions, will be found, upon the whole matter, to operate prejudicially.

2821. Do you not think that those remedies have been suggested mainly because parties felt the great disadvantage of the want of a full hearing, and were resorted to as a last resource to obtain that satisfaction?—I do not think there is any agreement of opinion in regard to all or any of them; the call for them seems to have originated more in some vague and general feeling of an existing evil, and of the consequent necessity of casting about for a remedy, than that

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they have been at all well considered in themselves ; at the same time it cannot be denied that, in practice, there are evils attending the reading of the record beforehand, as well as in the effect produced by the long and reasoned notes of the lord ordinary ; but, on the other hand, there are countervailing advantages, if the system generally was well managed.

2822. Suppose the judges were to read carefully the note of the lord ordinary, but still to hear the cause patiently, and with encouragement to counsel fully to argue it, do you think there would be any advantage in their having the subject-matter of the cause before them previously ?—I think there are minds from which it would be difficult to expect, if they were imbued with the notion that they had already mastered the case, the same degree of patience, or rather that they should not manifest some outward indication of disinclination to follow the course of argument, which they might not otherwise have done, if obliged to draw their knowledge of the cause for the first time from hearing it pleaded ; but, as a better habit of hearing becomes familiar, this will correct itself. At present, perhaps, the better course would be, that the party should be heard without the court having, in the first instance, read either the record or the note. If, however, they would allow the parties to begin and end the argument at bar as if they had not had the papers furnished to them, then I should not be for withholding that or any other means of information ; for, in that case, I should anticipate that the more previous knowledge the court possessed, the more intelligently would they hear, and the more satisfaction of course would they be enabled to give to the parties.

2823. Then, in your opinion, the suggestion does originate in this, that it is a mode of forcing a full and patient hearing, which otherwise, from the supposed indisposition of the court on the one hand, and from the disinclination of counsel to press against the presumed opinion of the court on the other, is not to be had ?—Yes.

2824. The suggestion has come from a wish to obviate that ?—Yes ; from a notion that there has been to a certain extent a preconceived judgment, without the proper elements upon which to rest, and a conviction that, where that is strongly felt, it becomes comparatively desperate to struggle against it, it may be, upon points, each, perhaps, separately, of no great apparent moment, but which, yet, had they been allowed to be fully brought out, and properly compared and worked up together, might have gone far to justify a quite opposite conclusion.

2825. Are you aware that the parties, in preparing their condescendence and answers, have very frequently in view a statement which shall impress the inner house upon the mere reading of the papers ?—No doubt counsel often prepare these papers with a view to the advantage to be gained from a well-suggested argument.

2826. Does it arise from the jealousy that there will not be a full hearing from the bar ?—Partly so ; though partly also, in many cases, with a view to avoid getting into the Jury Court, which is not a very popular tribunal. So far as the first of these causes is concerned, I should expect the discussion was made to rest, as it ought, chiefly upon oral pleading ; that you would find almost immediately a great correction on the length of the record and the mass of appendix added to it, which unquestionably is at present felt in many instances as a great evil, and must have gone to increase the expense as it increases the labour of all who have to deal with the matter.

2827. Have you ever happened to know cases ordered in the inner house at the request of both parties, upon the feeling of both parties that a written argument was the only way of insuring a full hearing in the inner house ?—Occasionally ; indeed, where the case involves any great length of detail, I do not think that either party has much confidence that it can be satisfactorily disposed of otherwise.

2828. Unless there is a solemn hearing in presence ?—Yes ; I should like to have every cause what is called being heard in presence. There should be no distinction in point of full and deliberate hearing between one cause and another. That, however, is a distinction which has existed so long with us that it may be difficult to correct it ; but we shall not be right till it is done.

2829. What is a hearing in presence ; be good enough to explain it to the Committee ?—I do not know that I can define it otherwise than as a full hearing  
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of the cause in a continuous statement, both of the fact and law, as applicable to the whole merits of the case.

2830. Where the counsel are allowed to open the case, as if the court were ignorant of the case, and give their full statement without any check, but encouragement rather?—Yes; and were the court to pay beforehand less attention to the statement upon the record and the ordinary's note, it might fairly be anticipated that they would not only permit but encourage counsel to go into the detail.

2831. Is that mode of hearing the exception or the rule?—The exception.

2832. You would wish it to be the rule?—I should.

2833. Mr. *Ewart*.] Is not a great evil in this system what may be called laying traps for admissions upon the record?—I do not know that I should call any proceeding a trap which is directed merely to the forcing of admissions on points of fact which ought never to have been denied. Such a proceeding seems rather to be a fair putting of the adversary upon interrogatory, on the party making averments of what he alleges to be the fact, and calling for an answer. There is an act of sederunt declaring, that, unless averments thus made be met in the answer by an explicit denial, they shall be held as admitted.

2834. Dr. *Stock*.] We have had a good deal of discussion with respect to the mode of abridging the labours of the judges and saving time, and there has been reference made to motions of course; is it your opinion, that, taking away the motions of course, time could be saved so as to render the present number of judges unnecessary?—Were motions of course, such as motions for an order to lodge papers, or for a prolongation of the time allowed in the preparation of pleadings, &c., to be thrown over upon a clerk of court, in place of having as at present to be disposed of by the judge, some time might undoubtedly be saved. But there are some practical difficulties in the way, which have made many doubt the expediency of taking any portion of the proceedings out of the judge's own hands. And, at all events, the matter should be left for regulation by a rule of court embodied in an act of sederunt.

2835. Is there much time consumed in debating alterations in pleadings that are brought before the lord ordinary and argued, whether the pleadings are prolix, or scandalous or impertinent?—No, not as the system has been worked. I am not aware of any single case where a discussion has taken place upon that subject. It was anticipated by the Judicature Act that a good deal of attention should be paid by the lords ordinary to the revising of the record; but this has degenerated in practice into little else than a form; and little or no good arises from the course that is actually followed. I have no doubt that a great deal of judicial time has been thus fruitlessly wasted. Had the judges brought the parties before them at chambers, and the record been there adjusted with the aid of mutual explanations from the parties, and more especially had the lords ordinary acted together upon some common and known principle in reference to this stage of procedure, the records would by degrees have been brought into a more correct shape, and the system would in time have become matured. As it is, the lord ordinary's reading of the record by himself in private, even where he returns it, as is sometimes done, with a suggestion of some slight change, is little better than thrown away; and, where counsel do not go into the suggested view, the judge is so little master of the case, he has practically almost no influence in shaping the record aright.

2836. Does not it strike you that, in a judicial system in which so much depends upon the statement of matters of fact, and the pleadings, and the forming the issues, it must be of the utmost utility to bring the matter under the decision of the judge?—There are a great many decisions among our reports, to the number perhaps of thousands, which have arisen under the new system from incidental discussions partaking more or less of this character; these have necessarily occasioned in various cases much delay and expense; and this I doubt not, lies at the bottom of a great deal of dissatisfaction which has been expressed in reference to the working of the system. If to this there had been added motions for correcting prolixity, impertinence, &c., in the records, the extent of incidental discussion would have been greatly increased, and of course there would have been a corresponding increase both in expense and delay. Perhaps this may have led to the discouragement by which, in practice, any attempt to introduce such discussions has been met. I am not sure, however, whether the more thorough reduction of our records into a correct shape, which

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could not have failed to result from a larger superintending control, either on the part of the judges, or some other proper officer, would not in the end have been purchased cheaply even at this cost. Looking at the system as a permanent one, we should certainly now have been in a better way, if, for example, there had been a body of clerks, like our issue clerks, to superintend the framing of the records, and we should by this time, I doubt not, have had, upon the whole, an infinitely better system of pleading.

2837. I do not understand the purport of one of your answers with regard to the blame imputable to the bar for the imperfections in the proceedings in the inner house?—When the Judicature Act was passed, the seniors of the bar, in whose hands chiefly was the business of the inner house, had been long trained to habits of pleading peculiar to and founded upon the system of written pleadings. After the change, the business of course continued in the same hands; and as it was easier for themselves, as well as understood to be more agreeable to the bench, they naturally continued their old habits of pleading, though no longer adapted to the working and success of the system recently introduced. In this respect, the habits and prejudices both of bench and bar concurred. And it was only as new men, trained under the new system, came forward, that a remedy could be looked for. Even now, with the inner houses as they are at present constituted, though there cannot be said to exist any actual impatience or unwillingness to hear, as the causes are there actually pleaded, there is but too much reason to apprehend that, were causes to be pleaded with the same fulness in the inner house that is familiar in the outer house, 'it would be difficult to suppress indications of impatience on the bench; and counsel feel it necessary to shape their pleadings accordingly.

2838. Mr. *Ewart*.] Have the more recently appointed judges shown more patience in hearing *viva voce* arguments?—Since 1825 there have gone into the inner house in the second division, I think, only Lord Medwyn, and in the first, Lord Mackenzie, and more recently Lord Corehouse, who has since been succeeded by Lord Fullerton. The introduction of these judges has certainly been to place the practical working of the new system on a more favourable footing. I cannot, however, say, that there is as yet any thing approximating to full or entire success. I have my own notions as to the causes of the want of success. Much will always depend upon the head of the court, and much upon the influence that will naturally be exercised by the elder members of the bench, upon individual judges added singly, and from time to time, to their number, and precluded, by the very course of precedent and practice settled by this court as it had been previously constituted, from taking the part which he might otherwise have done, in working out his own conceptions. One individual judge getting in among three is rather apt to be dragged along in the same course, and before another comes to his aid, he is, in point of judicial habit and practice, reduced very much to the same position with the rest.

2839. There has not been sufficient time to enable you to answer the question I have put?—No; we had in both inner houses, until lately, three, and at this moment we have two, of those who were brought up in the practice and imbued with the prejudices of the old system. But, when you shall have the inner house composed wholly of those who have been thoroughly trained up to the new order of things in the outer house, you may expect the change of system to come into more full play. I say this without any disparagement to the judges, who, I doubt not, yield involuntarily to the habits of that system they have been most accustomed to, and are perhaps not even aware that they do not give all the predominancy and effect to the new system which they ought to do.

2840. Mr. *Wallace*.] But the infusion of new judges has not had the effect of altering the proceedings of the court?—Not fully, though there has been an improvement gradually going on.

2841. Very slowly?—All the slower because there has been so much dissatisfaction expressed with the proceedings of the court, and such constant interruptions from repeated suggestions and attempts at innovation affecting both its constitution and practice. I do think it a very great evil that the court should be so often put upon its justification as it has been.

2842. Do you allude to the discussions out of doors or discussions in Parliament, or both?—I think there has been something too much exacted of the new system. It was a very great change, and has not had, even under ordinary circumstances, time to arrive at maturity. But more especially where the popular



pular mind is roused to a feeling of dissatisfaction against the court, there will naturally be created an action and reaction, and the existence of such a feeling is calculated still farther to postpone improvement in the working of a system that is new.

2843. How do you account for that?—It appears to me naturally the result of such a state of things.

2844. Is it not perfectly legitimate to discuss out of doors and in the walls of Parliament what may be the causes of dissatisfaction in the courts of the country?—Undoubtedly; and in the end, perhaps, the more discussion the more good will be done; but for a time, and especially (with reference to a change of system only in the course of being brought into play) if people's minds be distracted and agitated prematurely before that change has had time to receive fair play, not only may discussion be injurious, but it may itself be the existing cause of much dissatisfaction which would not otherwise have occurred, and in this way may indirectly have a strong tendency to retard the progress of improvement.

2845. How can it have had the effect of retarding the improvement?—Nothing is allowed quietly to settle down into consistency; so long as new changes are introduced, and others are constantly threatened, more especially where it is attempted by Acts of the Legislature to interfere with matters of procedure which can only beneficially be ordered by the legal tribunals, it is, in my humble opinion, at least, impossible to look for either real improvement or progression.

2846. It is perhaps the Judicature Act you alluded to?—No; there have been various legislative proceedings since that time, and a disposition to interfere by statutory enactments in much which cannot be corrected, or at all safely regulated in that way.

2847. Is it in the power of the court itself to alleviate any of the causes of discontent that have been so strongly spoken of?—Yes; the whole tenor of my evidence shows, that, provided the court had adopted a different and a better mode of hearing, a great deal would, in my opinion, already have been done to alleviate dissatisfaction. Accordingly, matters being precisely the same otherwise, I am not aware that any dissatisfaction has been expressed with the course of legal proceeding, either in the outer house of the Court of Session, or in the House of Lords as the high court of appeal. Besides, as mere matter of technical procedure, it is impossible to regulate or deal with them safely otherwise than by rules of court, or, as we term them, acts of sederunt. Acts of Parliament are wholly unfit for retrieving this end; their operation is too rigorous; and when a hitch is found practically to arise, there can be no remedy without again resorting to the Legislature. Whereas, if you have a court properly constituted, and able to direct its attention to the hitch as it arises, with power to remedy it, the ground of dissatisfaction may be removed at once.

2848. I find the concluding clause in a Bill introduced by Sir Islay Campbell, when Lord Advocate, in the year 1785, to be this: "And be it enacted by the authority aforesaid, that the judges of the Court of Session shall continue to meet for the space of a fortnight in the next autumn vacation immediately after the summer session, in order to revise the form of proceedings in the said court, and by act or acts of sederunt to regulate the said forms, and particularly to adapt them to the change which the diminution of the number of judges will occasion, and thereafter, from time to time, as occasion may require, to adjust and regulate the said forms by similar acts of sederunt of the court." Now, this provides that the Court of Session shall continue to meet for the space of a fortnight in the next autumn vacation, and every year, to regulate by acts of sederunt the forms of the court; are you of opinion that such an act of sederunt or Act of Parliament would be useful at the present time?—That enactment, as I understand, has actually been followed in its whole spirit and substance. It seems to have contemplated some change in the proceedings of the court, so considerable in point of extent as to require more than usual time for deliberation, and, accordingly, a fortnight of the vacation next ensuing its date is set aside for that purpose; but I do not understand that the yearly recurrence of a fortnight's deliberation was at all in view; on the contrary, what is pointed at is only such an adjustment from time to time generally as might be found necessary in the subsequent working of the system. That is to say, when any thing occurred, a new act of sederunt was to be made to meet the emergency. Now, the court have from time to time done this. They have constantly regulated their proceedings in the way proposed, and, from time to time, when change seemed necessary, in order to repress any felt evil, though not perhaps so speedily or

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so often as evils actually did press, they have passed acts of sederunt with that view.

2849. In the way I read that clause, the court would be bound to continue to meet for the space of a fortnight, if necessary, in the next autumn vacation, and also from time to time annually, that is to say, from year to year, to revise the acts of sederunt; that is my reading of the clause. I wish to inquire whether, in your opinion, it would be advisable that the court should revise its acts of sederunt, so as to settle any doubtful point, at the end of each summer vacation?—I do not so understand that clause, but, if it bear that meaning, I do not think it necessary that the court should so act. It is not advisable, in my opinion, to assume the necessity of a constant system of change, or of change at all, unless where there is really a present and a felt grievance to justify and call for it.

2850. That they should not revise the acts of sederunt every year?—When an evil is found to press, the court do revise or make a new act of sederunt to meet the case. I do not know that any routine proceeding, such as that suggested in the question, would make things better.

2851. Mr. *Ewart*.] Is it not from “time to time, as occasion may require”?—Yes, and they do now pass acts of sederunt from time to time, as occasion requires. After 1825 a great many acts of sederunt were made for carrying into effect the change of system, and the court have repeatedly since met to modify these acts of sederunt. There is scarcely a year goes round that we have not an act of sederunt for effecting some change or other that is thought necessary.

2852. Mr. *Wallace*.] Have any means been adopted to show to the Legislature, where the court have not the power of altering, by an act of sederunt, doubtful points, which would be beneficial to the public to have altered?—I am not aware that any particular steps have been taken; the acts of sederunt passed by the court must be submitted to Parliament from time to time.

2853. They have not submitted any proposal for doing away with doubtful points?—I am not aware that they have suggested any legislative measure upon the forms of process. As I have already stated, it does not appear to me, that the rules of technical procedure can be beneficially made the subject of legislative enactment. It would be the greatest evil that could befall the courts, where a particular form of proceeding was found not to answer, that they should never be able to correct it without coming to Parliament.

2854. The question referred to where the court had not the power to make the emendations they thought necessary?—I am not aware that any such course has been taken.

2855. You have spoken of the general dissatisfaction that prevails throughout the country with the way in which business is conducted in the Court of Session; do you believe that the public are aware of the want of the full hearing in the inner house of which you speak, or is that more felt by the agents and counsel?—Any party who attends at the hearing of his own cause, and feeling the importance of having it fully stated, can hardly be satisfied when, not very intelligibly to him, he finds both the counsel and the bench dealing with the cause in what he must consider a perfunctory manner. If, indeed, he gave the court the credit of having done their best to inform their minds at home, and felt in this respect as the counsel who address the court generally feels, there would be much less dissatisfaction, though, even in that case, it would not be entirely done away with.

2856. You stated one cause of popular dissatisfaction to arise from the delays and expense they are subjected to in having causes tried in the Court of Session?—So long as the system was not matured, so long as, from the occurrence of questions of construction on the import and effect of the statutory enactments, as well of the acts of sederunt following upon them, it was necessary to engraft upon the primary cause two or three incidental discussions in order to settle points of form and other technical matters, the burden fell of course upon the unfortunate party in whose cause the difficulty first arose. Those difficulties have been gradually obviated and done away with, and the consequent expense and delay have in the like degree been diminished. In a proportionate degree, therefore, it may be assumed, that this cause of dissatisfaction with the working of the present system, is substantially at an end. But let there be another great change, introduced like the former by an act of the legislature, and the new system will once more give rise to a similar series of technical difficulties; these will

will again occasion two or three thousand discussions on mere points of form, &c., the causes of dissatisfaction will be revived, and the evils of change will, from their very recurrence, be felt a hundred fold at least, unless the statute is perfect, which, looking to past experience, it would be vain to hope for.

2857. In the event of such a statute being introduced, would it not be a very proper exercise of the judicial functions to represent the inconveniences that have arisen?—I have said, and I can only repeat it, that it is my decided opinion that every thing, as it respects the technical management and conducting of causes in court, all that goes to regulate or modify the forms of process is matter for the court, and ought to be left in the hands of the profession, and is most decidedly not matter for legislation.

2858. You have given your opinion decidedly against the proposal of doing away with one of the inner houses?—Yes.

2859. If the sitting of the judges were to be protracted to six hours a day, and the session was prolonged to nine months, you would be of opinion that one court would not be sufficient?—I said, I should think the experiment at present dangerous; for, though we have, just now, a certain apparent decrease of business, many think that that decrease arises from temporary causes, and until it be decided that it arises from permanent causes, it would be unsafe to legislate upon the opposite assumption. But further, the two divisions are at present occupied each, say three hours a day, or between them about six hours is given to the performance of judicial business in court. Now, were one division to do the whole work that is at present done by the two, and to do it no better, nor bestow upon the doing of it more either of time or deliberation, this would give to that division a sitting of six hours a day; the prolongation of the time of sitting would work no improvement whatever in the mode of performing the business; and you would of course have no opportunity for the amendment of the system in other respects, and more especially no means of remedying the evil, in so far as it exists in the want of a proper, full and deliberate discussion of the cause. But if the union of the two divisions would thus leave you where you are, I think it necessary to have the two divisions, in order to secure the benefit of an improved system.

2860. You alluded to its being possible, if not probable, that, when certain improvements were made, the business of the court not increasing, that such a change might be advisable as the reduction of one of the divisions?—No; what I said was this; if you find, after making all possible improvements upon the system as it is, that there is so much judicial time unoccupied, that one division can be spared, you will then have elements to act upon that you have not now, and may then do with comparative safety what would be at present a mere leap in the dark.

2861. What improvement do you allude to?—That the inner house shall hear as fully as the lords ordinary now do in the outer house, and as the House of Lords also do in the last resort; that the records, which are very much made up at present in order to catch the minds of the court in their private readings, shall be improved; and that you shall have the system of *viva voce* pleading thoroughly brought into play. When all this shall have been done, you can then ascertain whether the courts have too much time; I anticipate that they will not be found so to have; indeed, in place of having too many judges, I should say, if my anticipations as to the extent of time that a proper system of hearing would take up are correct, and if the judicial functions were performed wholly in court instead of nine-tenths of the time and labour of the judges being taken up out of court, the chance is that you might require to have even more judges than at present.

2862. The returns to the House of Commons show a very large decrease of business flowing into the Courts of Session in the last ten years, and it is in evidence that there is a decrease in the number of gentlemen at the bar and the agents before the court, still the daily sittings of the court and the yearly sessions of the court are the same; would those facts not induce you to believe that fewer judges could accomplish the work than what we have at present?—I can give no other answer than I have done; I do not think that such would be at all a legitimate conclusion to deduce from those circumstances, some of which are explainable in other ways; I think, moreover, that there must be some great fallacy in the returns that have been made.

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2863. Will you state what you conceive to be the fallacies?—That would lead into very great detail, and would require an examination and analysis of the different returns, for which I am not at this moment prepared.

2864. How many judges are there in the Justiciary Court?—There are seven, if you include the Lord Justice General.

2865. He never sits in court?—The Lord President has sat since he received that appointment; but formerly the Justice General did not sit, and it is but occasionally that the President attends, as, for example, when a quorum may not be made otherwise.

2866. How often does the court meet whilst it sits in Edinburgh?—Its sittings are not regular, but according as business shall be brought before them. There are sittings, generally, both before and after each of the sessions of the Supreme Civil Court, and also during the Christmas recess. These sittings usually last for about a week; but they continue for such time, be it more or less, as the business actually requires. Besides this, if there be any business during the session of the civil court, the vacant Monday is given; and it has been latterly arranged to take also the teind Wednesday, where necessary, to meet the increased business of the court, in order to clear the gaols more rapidly.

2867. So that, during the sittings of the Court of Session, the Court of Justiciary sits on criminal business?—Yes, almost every Monday. It is not the fault of the court if every Monday is not given. They sit or not, according as business is brought before them. The business is generally kept pretty well up. There is no arrear.

2868. How often are circuits performed in Scotland?—Twice in the year; in the spring and autumn; there is, besides, an additional circuit for Glasgow in winter.

2869. How many towns are visited on those circuits?—The whole of Scotland is divided into three districts. The court divides itself into three bodies, and the circuit of Scotland is made by two judges going to each of the three districts. In each of the districts there are three towns.

2870. So that nine towns are visited by the judges?—Yes.

2871. Do two judges always go circuit?—Yes, there are always two named; but, when the business is light, they sometimes arrange among themselves that one shall not go to a particular circuit town, in which case the court consists of a single judge.

2872. Do any of the leading counsel go circuit in Scotland?—None on the justiciary circuit; nor do I know any thing to induce the senior counsel to go circuit. The business is conducted altogether *in forma pauperis*, and there is no circumstance in circuit business to draw a bar after it; the circuit courts are generally attended by young men learning their business.

2873. Are there any civil causes upon the circuits?—No, except a few appeals from the inferior courts of the district.

2874. Are not civil causes tried occasionally when the judges are upon circuit?—Yes.

2875. Are not civil causes when tried by a jury in Scotland much more expensive than the common mode of trying causes?—No; at least if there was any length of proof to be taken; I should say the expense would be less than were the same proof to be taken on commission.

2876. Is proof often taken on commission?—No, very rarely, except in the inferior courts, and even there it is attended with considerable expense.

2877. Does not a commission follow after the autumnal circuit in Glasgow to try civil causes?—Yes, where there is jury business.

2878. Are you not aware that judges who do not belong to the Justiciary Court are sent to try civil cases?—Yes.

2879. When this course is adopted, after a judge has been on the circuit, is it not attended with great expense to send another judge instead of causing the judge on circuit to try the jury causes?—There is nothing, so far as I am aware, to create any additional expense, unless it be a separate allowance for the expenses of the judges.

2880. And the expenses of the officers of the court who attend them?—Yes.

2881. Dr. Lushington.] The officers of the Jury Civil Court must equally go one time as the other?—Yes.

2882. Could not you unite the duties of the clerks in the civil causes with the duties of the clerks in the justiciary causes, so as to save the expense of the

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the two separate bodies on the circuit?—Not according to the present constitution of the courts.

2883. Mr. Wallace.] You have stated the jury trial in Scotland to be not very popular?—It is not so popular as was originally expected. There are different causes that have tended to diminish its popularity; but I do not think that these sufficiently account for the extent to which it is unpopular.

2884. In your particular department, you have a constant and excellent opportunity of observing the conduct of jury trials in criminal cases?—Yes.

2885. Can you account for why a criminal trial, with the aid of juries, is so universally popular in Scotland, whilst in civil causes it is truly said to be so universally unpopular?—In the criminal courts it is not necessary that the machinery should work so finely as in the civil courts; all the leanings are on one side, in favour of the prisoner; there is no inducement even for the public prosecutor, who performs a sort of *quasi* judicial function, to press matters, as it would be the duty of the counsel for a private party in a civil question to do; there is not the same collision of adverse interests;—and of course all works more smoothly, and, by a natural consequence, less anxiously and less expensively. The greater unpopularity of the jury court may in part also be owing to this,—that the expense, which used to be dribbled out, in small sums, and from time to time, now comes upon the party all at once: then there is the disappointment caused by witnesses brought up and not rendered available, while their expenses are still to be paid; to say nothing of the system itself not operating according to the feelings, it may be the prejudices, of our countrymen, in the constant attempt made by counsel to have the advantage of a reply, which often leads the defender's counsel to sacrifice evidence that the defender himself thinks of the utmost importance, &c. &c.

2886. Are not jury trials in civil causes very frequently compromised just immediately before trial, after all the expense has been incurred?—I should not say immediately before trial. There have been cases compromised immediately before trial, but many more have been compromised before they have come to that stage at which the preparation for trial takes place, and very naturally so, because, when the matter comes to be compressed into an issuable form, the party is led to see how far the case can be supported by evidence; and the weakness of his own side, as well as the strength of the other, is frequently in this way so conclusively brought out, as to make it desperate to go further.

2887. Is it to be inferred, from the court sitting so much more frequently in Edinburgh than it does on circuit, that the persons accused of crimes have to remain a much shorter time in prison before trial than they do in the country?—There must be some misapprehension; there are not many cases brought up to be tried before the high court which ought to have been tried on circuit.

2888. Are not offenders within the jurisdiction of the high court, when sitting in Edinburgh, less liable to a long imprisonment than those in the country, in consequence of the frequent sitting of the Justiciary Court?—Yes, they are, in many cases; but in Glasgow, which is the other heavy district, the winter circuit gives a great relief.

2889. Is not the practice becoming much more common, to make over offenders to be tried by the sheriffs' juries, than it used to be?—There has been a great increase of criminal procedure all over the country; there are a great many more cases tried by the sheriff, as well as a great many more both by the Circuit Courts and High Court of Justiciary. A comparison of the tables given in the 5th Report of the Commissioners on the Courts of Justice in Scotland, which was ordered by the House of Commons to be printed 25th January 1819, with the tables of criminal offenders, prepared and ordered to be printed by order of the House, for the years 1836, 1837 and 1838, will show how very rapid and how constantly progressive this increase has been.

2890. What may be the age of the youngest criminals who are tried by the Justiciary Court?—I have seen them very young; I am not prepared just to tell you at present.

2891. About?—I have seen them transported as young as 14; but this happens chiefly in the case of habit and repute thieves who have been often before convicted of theft in the Police, and Burgh, and Sheriffs' Courts; and being proved to be quite incorrigible, the continued periods of imprisonment working no remedy, there is no other mode but to send them abroad; under the recent statute for improving the prisons in Scotland, means will be afforded for intro-

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ducing a more effective system of prison discipline, and it may then be tried how far a longer term of imprisonment may not to some extent be employed, as a secondary punishment, to supersede transportation.

2892. Will you state what distinction there is between the alleged crimes of those who are tried before the justiciary and those who are tried before the sheriffs?—It is the lighter class of cases that are sent to the sheriff; no capital case is ever so tried, though there are cases which legally might infer capital punishment unless restricted.

2893. Is not the restriction of punishment left to your department?—It lies altogether with the public prosecutor; but not as a matter of arbitrary discretion; the cases in which there should be restriction are as thoroughly understood and settled in practice as any thing in the law.

2894. I find, that in the two counties with which I am connected, at the last assizes at Glasgow, eight persons were left over for trial by the sheriff; I have got their names and offences before me; two were accused of thefts; one of theft and reset of theft; two of theft, being habit and repute thieves; one of assault; one of rioting and assault, and one of theft by means of housebreaking; now, I wish to know if those are not the most common criminal cases that come before the justiciary?—Most of them are; I do not know the circumstances of the cases referred to, and of course am not able to explain the grounds upon which they were handed over to the sheriff.

2895. Is there not a large proportion of all the offenders before the criminal courts of Scotland who plead guilty?—There are many who plead guilty; and the more perfectly the system is administered, the more will there be of those pleas.

2896. Are not those pleas of "guilty" one of the consequences of the court sitting so short a time, except in the town of Glasgow?—No; there is no distinction in this respect between one set of circuit towns and another.

2897. Does not this mode of pleading give longer time to the judges upon circuit, and leave them more time than they used to have?—No; the time of the judges is more taken up than it used to be.

2898. The judges are longer upon the circuit?—Yes; the Glasgow circuit, that used formerly to rise sometimes on the 1st day, has latterly been obliged to set frequently till the 7th, and even the 9th or the 10th day.

2899. In other towns?—The judges must by statute remain at least three days if there be business; at Aberdeen and Perth it has been found sometimes necessary to take a fourth day.

2900. So that the time of the judges is more upon circuit than it used to be, independent of Glasgow?—Yes, I think it is so generally.

2901. It is in the power of the Lord Advocate's deputies to restrict the punishment upon any specific crime, provided it is not one of great aggravation?—The advocate-depute has no power of restriction but in capital cases,—and even in these, except to the effect of removing the capital pain, he has no power whatever over the punishment; every thing but the capital punishment is in the hands of the court.

2902. Has the depute advocate no power of that kind?—No.

2903. In diminishing the number of trials, what powers have the depute advocates on circuits of making them over to the sheriff, for instance?—None whatever; he must try all his causes, unless for some good reason he can justify the leaving them over. The absence of a necessary witness, the expiration of the time allowed for a particular circuit town, and the necessity of proceeding on to another before the business is wholly exhausted, &c., &c., may render it occasionally necessary to leave one or more remanets. In such cases, to prevent an undue prolongation of the accused's imprisonment before trial, it is not unusual to send causes for trial to the sheriff which it was intended to try and which would otherwise have been tried in justiciary.

2904. The judges do not make the gaol delivery, but leave such offenders for trial as they cannot overtake?—Yes; but there is not much of that; it very seldom happens.

2905. Is all the duty put upon the sheriffs that can be at present under the administration of the Lord Advocate's office, to give them as many offenders to try by a jury as they can get through?—Yes; all parties, indeed, have an interest to throw as much upon the sheriff as can be done with propriety; the advocate-depute to relieve himself of labour, and the magistrates to get their gaols free.

2906. The

2906. The sheriffs have not the power to award the punishment of transportation?—No.

2907. Then, any offender whose alleged crime does not entitle him to suffer transportation may be made over for trial by the sheriff?—He may.

2908. Is this all judged of by the law officer?—Yes.

2909. By the Lord Advocate when in Scotland, and yourself in his absence?—By the advocate-depute most usually; of course under the superintendence and control of the Lord Advocate or Solicitor-General.

2910. Would it not be a very great advantage to our criminal jurisprudence if the sheriffs had the power of transportation conferred upon them, so that they might without delay bring persons to trial, and so save a great portion of the time they are kept in gaol previously to trial?—I do not know that the Sheriffs' Courts at present possess sufficiently the confidence of the country to make that desirable, and the sheriffs would scarcely like, I think, to have so heavy a responsibility thrown upon them.

2911. Are not those trials, like what I have referred to in the counties of Lanark and Renfrew, thrown upon the sheriff's substitute?—Yes, it must be so sometimes, in the absence of his principal, in order to despatch the business.

2912. Has there any complaint reached your office of the inefficiency of sheriffs, or sheriffs-depute, for criminal trials?—None.

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## A P P E N D I X.

REPORT of the JUDGES of COURT of SESSION to the HOUSE of LORDS, 27 February 1810. Report of Judges of  
Court of Session to  
House of Lords,  
27 Feb. 1827.  
(Referred to by Mr. *William Alexander*, W.S., in the Minutes of Evidence  
of 25 March 1840.)

REPORT of the LORDS of COUNCIL and SESSION in *Scotland*, most humbly offered in answer to an Order of the Right honourable the Lords Spiritual and Temporal, in Parliament assembled.

Evid., p. 44.

THE following order, having been received by the judges in Scotland at the close of the summer session, in July 1808, was recorded in their books :—

“ Die Martis, 28 Junii 1808.

“ Ordered by the Lords Spiritual and Temporal, in Parliament assembled, That the lords of session do prepare and submit to this House copies of all acts of sederunt now in force, distinguishing those which, strictly speaking, are rules of court, and prescribe forms of proceeding, from those that explain or in any way affect the law of the land.”

As it became necessary to adjourn the further consideration of this order till a subsequent meeting of the court after the autumn vacation, the then lord president, at the desire of the other judges, undertook the business of preparing materials for making the report; but his lordship soon after retired from the office; and the attention of the judges having since been occupied by the important alterations made on the constitution of the court, and the arrangements which were thereby made necessary, besides the labour of bringing up the ordinary business of the court, which had fallen greatly in arrear, it was not in their power till very lately to resume consideration of the order from the House of Lords; and they now humbly make their report in obedience thereto as follows :

The acts of sederunt of the Court of Session, under which name is comprehended every act, regulation or proceeding which the court has appointed to be recorded in the books of sederunt, have been gradually accumulating for the space of near three centuries, since the first institution of the court in 1532, and are now very numerous. In 1790 a compilation of the whole was made out from the original record by Mr. William Pait, a member of the Faculty of Advocates, under the authority of the court, and published, in one volume, in folio, containing 644 pages. This printed volume we believe to contain an accurate and authentic copy of the whole acts of sederunt, so far as it goes, and as such it is quoted and referred to in the daily practice of the court. The only defects of it, so far as we know, are what arose from the imperfect state of the record at the time of publication. The books of sederunt for the first 20 years after the institution of the court had long ago disappeared, and were supposed to be lost. But we understand that this part of the record has been lately discovered in the General Register House; and that steps have been taken, by order of the lord clerk register, for making out a correct copy thereof, which, from the bad condition of the manuscript, is stated to be a work of considerable difficulty. Another volume of the record was and still is wanting, containing the acts of sederunt from 19 June 1605 to 2 November 1626. During this period we know that several acts of sederunt were made, particularly one of great importance with regard to *dyvours* and *bankrupts*, which was afterwards confirmed by the Parliament of Scotland, “as a necessary and profitable law;” and which, accordingly, appears *verbatim* in our statute book. There are also copies extant of other acts of sederunt at this time, which however, in our opinion, cannot be relied upon as absolutely accurate and authentic.

By the above order, which it is our inclination as well as our duty to comply with in the fullest manner, so far as lies within our power, we are required “to prepare and transmit to the House of Lords copies of all acts of sederunt now in force.” The import of which we conceive to be, that we shall prepare and transmit copies of the whole acts of sederunt which have been made since the institution of the court, excepting only those particular acts which have ceased to be in force by being repealed or otherwise. The first and most essential part, therefore, of the duty laid upon us is to examine attentively the whole acts of sederunt from first to last, and to ascertain with precision what particular acts, or parts thereof, have been repealed, altered or abrogated by disuse. And with regard to this part of the business we beg leave to represent, 1st, That when successive acts of sederunt have been made by the court with respect to the same or similar subjects (which has happened very frequently), it has not been the practice of the court to insert in the new act any express repeal of the former acts, which were thereby meant to be altered, in whole or in part; so that, in order to distinguish accurately betwixt the acts of sederunt which are now in force, and those which have ceased to be in force, in whole or in part, it would be necessary to examine every one act of sederunt, and to compare it with all the prior acts, in order to determine how far the regulations of the one are, in whole or in part, inconsistent with all the prior ones relative to the

the same subject; and what adds to the difficulty of such an examination is, that the acts of sederunt frequently contain regulations and orders with respect to matters which have very little connexion with one another; so that even the examining and comparing of all the acts relating to one matter would not answer the purpose. In order to attain to perfect accuracy, it would be necessary to examine every one act through all its different regulations, numerous as they are to compare it with all the other acts, and to consider its operation upon such as are prior in date, and how far the one is inconsistent with the other, so as to have the effect of a virtual repeal or alteration thereof; and this, we are satisfied, would be a work of much more time and labour than it is possible for the judges of this court to accomplish consistently with the execution of their important duty as judges.

2dly. We must further observe that by the law of Scotland even Acts of Parliament before the Union were held to lose their force by *disuse*, without any express repeal, or to go into desuetude, as it was termed; and the same is still understood to be the case with regard to the acts of sederunt; so that besides an examination of the whole acts of sederunt in the books of sederunt, in order to fulfil the order of the House of Lords, it would be necessary to enter upon an extensive investigation with respect to the practice for many years past, through all the different departments of business belonging to the court, in order to ascertain what acts of sederunt or parts thereof were in desuetude, and in that way had ceased to be regulations in force. We know that in deciding causes which turn upon the construction of our statute law, it is sometimes a matter of considerable difficulty to determine whether a particular Act of the Parliament of Scotland has or has not gone into desuetude. But were we required to make a general report upon the statute book of Scotland, and to distinguish every one law which is in desuetude from those which are not, we should find ourselves nearly as much at a loss how to make our report as in the present case.

The order further requires us to distinguish those acts of sederunt "which, strictly speaking, are rules of court, and prescribe forms of proceeding, from those that explain or in any way affect the law of the land."

The acts of sederunt which come under this last description appear to be of two different kinds; 1st, Acts which either have altered or made additions to the law of Scotland existing at the time, which was the proper province of the legislature; and, 2d, Those which were explanatory of what the judges considered to be the law, and which were appointed to be recorded in the books of sederunt by way of notification to the lieges.

With regard to acts of this first class, we observe that a practice at one time prevailed, that when any act affecting the general law was made by the Court of Session, such act was afterwards taken under consideration of the legislature, and, if approved of, was ratified by an Act of Parliament. Thus we find in our statute-book the following Acts of the Scots Parliament, proceeding upon and confirming acts of sederunt which had previously passed through the Court of Session: Act 1559, cap. 75, intituled, "For punishment of persons that contemptently remains rebels, and at the King's horn." Act 1594, cap. 138, intituled, "An Act anent slaughter and trouble made by parties in pursuit of their actions." And Act 1621, cap. 18, a ratification of the Acts of the Lords of Council and Session made in July (1618), against unlawful dispositions and alienations made by dyvours and bankrupts. But the acts of sederunt which are referred to in the above Acts of Parliament, and which are thereby confirmed, from the imperfect state of our records, are not to be found in any of the books of sederunt which are in the hands of the proper officer of court.

But there are other acts belonging to the above class, and which, in our opinion, required the authority of the legislature in order to give them force, which, so far as we know, never were confirmed by Parliament. Of this nature is an act of sederunt, bearing date 28 February 1662, intituled, "Act anent executors creditors," which certainly made a considerable alteration upon the common law of Scotland, by introducing a more fair and equal mode of attaching the moveable or personal estate of a person deceased, which formerly stood upon a very imperfect footing, and was much complained of; and, accordingly, although this act never was ratified by Parliament, it has been universally followed out in practice by every court of law in this country, and has long been considered as a part of the established law of Scotland.

To this class also belong two acts of sederunt, by which the Court of Session attempted in vain to remedy the imperfection of the common law of Scotland with respect to bankruptcy, the rules of which were so imperfect as to put it in the power of a creditor who lived in the neighbourhood, or who was anywise connected with the bankrupt, to secure to himself a preference upon the funds, by using the form of legal diligence to the exclusion of all the other creditors who had not the same advantage. One of these acts bears date 29 July 1735, intituled, "Act for the security of creditors and better management of the estates of bankrupts and others;" and the other is dated 10 August 1754, "Act of Sederunt anent poindings and arrestments:" both these Acts were temporary, being declared to endure only for three years, and they never were renewed, which we presume must have arisen from a conviction in the minds of the judges, who then sat in the court, that these acts were beyond their powers, and related to matters which properly belonged to the legislature. And accordingly, at a subsequent period, the evils which the court had attempted to remedy drew the attention of the legislature, and were remedied by the Act 12 Geo. 3, cap. 72, intituled, "An Act for rendering the payment of the creditors of insolvent debtors more equal and expeditious, &c. in that part of Great Britain called Scotland;" and by successive statutes afterwards enacted, which now compose the system of bankrupt law in Scotland.

The

The other class which we have mentioned above is that of acts of sederunt, which, although they touch upon general matters of law, may be considered merely as expressing the opinion of the court with respect to some article or branch of the law existing at the time. And of this kind, the one which seems to merit most attention is an act of sederunt, bearing date 14 December 1756, intituled, "Act of Sederunt anent removing." Besides some regulations concerning the form of procedure in actions of removing, this act contains also some matters respecting the general law concerning leases and removings. But whether these are not warranted by the principles of law previously acknowledged, and by a series of precedents and decisions of the court, appears to us at least a very questionable point; and that being the case, we do not consider it to be requisite or proper to make a more particular report upon this subject, as this could not be done without our forming and delivering our opinion upon some very general and difficult questions of the law of Scotland, which we presume it was not meant that we should attempt to do, without having any particular case before us, and without the advantage of having the case discussed, and the precedents and authorities upon the subject brought under our review, by the pleadings of counsel, as in ordinary causes. But we know that the law, as laid down or explained by this act, has been found by experience to be of considerable service to the country.

The acts of sederunt which have been made since this last-mentioned act in 1756, appear to us to contain only such regulations as were within the power conferred upon the court by its original constitution, or were authorized by statute.

We cannot conclude this report without expressing how much we are sensible of its imperfection, and that it has not fulfilled the precise terms of the order received by us so completely as it was our earnest inclination to do. But we have endeavoured to assign the reasons of that imperfection; and we trust that these will be considered with indulgence by the most Honourable House, and received as a reasonable apology on our part.

### Appendix (A.)

STATEMENT, showing that the Business of the Court of Session has been rapidly decreasing since the Year 1794, the Date of the first Return to be relied on.

Appendix (A.)

#### I.—OUTER HOUSE.

Evid., p. 74.  
Q. 912.

By an official return laid before Parliament, and printed in a Parliamentary Report (No. 241) of 1824, p. 235, it appears that there were enrolled in the outer house printed Rolls of the Court of Session for the first time, during the 30 years 1794–1823, 73,672 causes, being on an average 2,455 causes per annum; but in the first five years of that period, the average number was 2,607; in the last five years of the period 2,245, being a loss of business in the outer house, during the 30 years between 1794 and 1823, of 463, or about one-seventh, or 14 per cent. In the year 1794, 2,789 causes were enrolled; in 1823, only 2,124; decrease 665, or about one-fourth, or 24 per cent. In Darling's Practice of the Court of Session, published in 1832, p. 3, there is the following statement as to the falling off of the business of the Court: "The business of the Court of Session has diminished rapidly during the last 40 years, although in that period the population of the county has increased at least one-half, and its wealth, and the number of transactions, in a still greater ratio. Thus, the value of cottons manufactured at Glasgow 40 years ago did not amount to a million a year; now they approach six millions. The rental of the same city in 1803 was 81,000*l.*; now it is 383,000*l.* Between 1790 and 1810, the linen manufactory in Scotland was doubled in extent; in 1822, linen of the value of two millions sterling was exported; while in 1812, the exports of this article were worth only 830,000*l.* These facts shew that the business of the country has greatly increased; yet the cases enrolled in the outer house Rolls averaged, for the four years preceding 1798, 2,631 annually; for the four years previous to 1810, when the fee fund was imposed, 2,594; for the four years after, 2,374. This was an annual average deficiency of 220 cases. The average of the four years before the late Judicature Act came into operation, 5 July 1825, was 2,143, and for the four years afterwards only 1,998, giving an annual average of no less than 791 fewer than the year ending 11 July 1794, when 2,789 cases were enrolled. Notwithstanding the abolition of the Commissary and Admiralty Courts, which occasioned an influx of business into the Court of Session, the whole number of cases enrolled in the outer house Rolls, in the year 1831, amounted to only 1,956." That statement has never been contradicted.

The causes enrolled in the outer house Rolls for the last four years are as follows:

1836	-	-	-	1,770	} Or a yearly average of 1,592 causes.
1837	-	-	-	1,555	
1838	-	-	-	1,486	
1839	-	-	-	1,558	
				4)6,369	

Being a decrease of the business of 1794–8 of 1,015 causes, or nearly 40 per cent., and on the business of 1819–23, of 652 causes, or 29 per cent. In 1794, there were 2,789 causes enrolled; in 1839, 1,558; being 44 per cent. of decrease.

Further, by the Report above mentioned, p. 236, it appears that in the 30 years 1794–1823, "the number of cases finally decided by decrees *in foro*," by the lords ordinary in the outer house, was 43,994, or 1,466 annually. In the first five years of the period, the annual average number was 1,531; in the last five years of the period, the annual average number was 1,424.

being a decrease of 107 cases annually, or seven per cent. In the year 1784, there were 1,447 judgments pronounced; in 1823, only 1,288; shewing a decrease of 159 causes, or 11 per cent. In the last five years, 1835-1839, "the number of final judgments pronounced in litigated causes," i. e. decrees *in foro*, is as follows:

1835	-	-	-	649
1836	-	-	-	710
1837	-	-	-	600
1838	-	-	-	507
1839	-	-	-	699
				3,165

Or 633 annually. Decrease of final judgments, as contrasted with the five years 1794-98, 898; as contrasted with 1819-23, 791, being 58 per cent. on former period, and 52 per cent. on latter period.

It may here be remarked, that while the number of cases coming into the outer house during the last 10 years has decreased 20 per cent., the number of decrees in absence has increased. In 1832, of 2,041 cases inrolled, 563 were decided in absence; in 1839, there was the same number of decrees in absence, out of 1,558.

## II.—INNER HOUSES.

Messrs. Shaw & Dunlop, in their Reports, notice every case decided in the inner houses, in which any thing remarkable occurs. The following is the number of such cases decided in the inner houses at two periods, as appears from their Reports. From 12 May 1821 to 12 May 1825, being four years, 1,804 causes or 451 annually; from 13 November 1832 to 13 November 1835, being the last three years in which Mr. Shaw was connected with these Reports, the total number is 1,150, 383 annually, a decrease of 68 annually, or 15 per cent. These Reports are still continued by Mr. Dunlop, on the same principle; and from November 1837 to November 1838, the number is 279; from November 1838 to 1839, 293; showing a decrease of business, as compared with 1821-25, of 37 per cent. The inner houses' business must go on diminishing; for the principal and most important part of it is derived from the outer house; and it has been shown that the business of the outer house has fallen off greatly. Accordingly, it appears from the annual returns, that, including cases decided by jury trial, there were 524 final decisions pronounced in the year 1831, and there were only 321 in 1839, a decrease of 39 per cent. of inner-house business in eight years only. These are the first and last years of the returns ordered under the statute of 1 Will. 4, c. 69.

Looking at the matter generally, it is impossible to dispute that the business of the court has fallen off one-third within the last quarter of a century.

## Appendix (B.)

(Evid., p. 75, Q. 931.)

RETURN of the Number of CAUSES instituted and decided in the COURT of SESSION in Scotland, between the 1st day of January 1839 and the 1st day of January 1840;—showing the Number of Causes ready for Judgment, but not disposed of at the last of these Dates.

### OUTER HOUSE.

Names of Lords Ordinary.	Number of Causes for the first time enrolled before each Lord Ordinary.	Number of Decrees in Absence.	Number of final Judgments pronounced in Litigated Causes.	Number of Causes ready for Debate, but not heard, with the Date when the First of these Causes was first enrolled in the Debate Roll.	Number of Causes at Avisandum.	Observations.
Lord Fullerton, from 1 January to 13 May	59	563	52	None	None.	
Lord Moncreiff	216		82	41 - 1 June 1839	14	
Lord Jeffrey	322		224	82 - 12 March 1839	None.	
Lord Cockburn	331		124	3 - 18 December 1839	1	
Lord Cuninghame	513		161	15 - 27 November 1839	2	
Lord Murray, from 20 May -	117		56	10 - 19 November 1839	7	
	1,558		699	151	24	

### INNER HOUSE.

	Number of reclaiming Notes presented against Judgments of Lords Ordinary in the course of the above Year.	Number of incidental and summary applications presented during the same period; distinguishing those which have passed as matters of Form from such as have been followed by Litigation.	Number of final Judgments pronounced in Litigated Causes without the intervention of a Jury.	Number of Causes tried by Jury.	Number of Causes ready for Judgment, on hearing Counsel or otherwise, with the Date when the first of such Causes was so ready, and distinguishing those to be tried by Jury from such as are not to be so tried.	Observations.
First Division	184	{ Form - 559 } 652 { Litigation 93 }	143	14	{ Ordinary Actions - 48 } 62 { 12 Nov. 1839. { Jury - 14 }	
Second Division	171	{ Form - 448 } 506 { Litigation 58 }	145	19	{ Ordinary Actions - 30 } 39 { 12 Nov. 1839. { Jury - 9 }	
	355	1,158	288	33	101	

## Appendix (C.)

STAGES of an ORDINARY ACTION in the COURT of SESSION till the Decision of the LORD ORDINARY is obtained, showing how often the LORD ORDINARY is applied to unnecessarily.

Appendix (C.)

Evid., p. 76.  
Q. 956.

1. Cause enrolled ; summons and defences given in to be read by Lord Ordinary.
2. Cause called ; usual order, condescendence and answers.
3. Cause called ; diligence to one or other of the parties to recover documents in support of the case.
4. Cause called ; order to revise condescendence and answers.
5. Cause called ; order to re-revise ditto.
6. Cause called ; time prorogated for lodging condescendence and answers.
7. Cause called ; parties state they are ready to close record ; whole process sent to judge, who must go over it carefully, to ascertain if parties have stated their case in conformity with the Acts of Parliament and acts of sederunt. This duty, though laborious, is in general useless. Case often remains with judge for a month or two.
8. Cause called ; parties state they are ready to close ; counsel sign record, and it is also authenticated by Lord Ordinary.
9. Cause called ; parties ordered to debate.
10. Closed record sent to judge, that he may read it before debate.
11. Debate.
12. Very generally the process and notes of debate taken by Lord Ordinary are taken home for consideration, after hearing parties orally, and before pronouncing judgment.
13. Judgment pronounced, and generally accompanied by a note explaining the grounds of the decision.

This is a very ordinary case. In most cases there are many more applications to the judge previous to No. 10.

If such a decision of the Lord Ordinary be got in two years, and for 50*l.* each side, although there may be only 30*l.* or 40*l.* at stake, it has been actively and economically managed on the part of the agent.

The whole proceedings, up to No. 10, should be conducted without application to the judge, except where one of the parties will not go on. In such a case, the judge should give the full costs of the application to him, and enforce their immediate payment. In the case of a preliminary defence, such as informality in the proceedings, &c., as contradistinguished from a defence on the merits, the applications Nos. 1 & 2 are necessary ; for if the preliminary defence be sustained, the action is of course dismissed, without any litigation on the merits, leaving the pursuer to bring a more correct action, if he chooses.

The expense previous to No. 10 may probably be 40*l.* each side. Were the preparation of the cause previously to be conducted without the judge, as it certainly could be, both efficiently and conveniently, a great part of his time would be saved, and a final decision obtained in one-third of the time spent at present, for the cause would proceed in vacation as well as in session, which would be of infinite advantage to suitors. When the time of session arrived, the judge would have little more to do than hear debates. The preparation of the record is no part of the legitimate functions of a judge, but is the proper business of counsel and agents. The time has now come for relieving the judge of this part of his functions. First Report Law Commissioners for Scotland, No. 295, Session 1834, p. 39, &c. &c. and Evidence of Witnesses in Appendix.

## Appendix (D.)

EXTRACT from Page 39 of FIRST REPORT from LAW COMMISSIONERS (Scotland).

Appendix (D.)

The Commissioners say, " But while we think that the superintendence of the Lord Ordinary, in the adjustment of the record, cannot at present be dispensed with ; and that the advantages to be derived from it very far counterbalance the objections to which it is exposed, we entertain a pretty confident expectation, that in no great space of time the mode of pleading may be so improved, and a proper and consistent system so completely fixed, and the necessity of adherence to it so firmly impressed upon practitioners, as to render it safe to relieve the lords ordinary of the task now imposed upon them in the adjustment of the records. That this should be done as soon as it can be done with safety, we are perfectly convinced. But assuming that some additional call should thus be made upon the time of the lords ordinary, they might, we think, be very easily indemnified for the encroachment, by relieving them of the duty of calling their hand-rolls, in so far as regards the great proportion of cases that come into those rolls. According to the present practice, a considerable portion of the time employed in court by each of the lords ordinary is devoted to the calling of these rolls, for the purpose of disposing of motions made in the preparation of cases. A great part of this time is, in our opinion, wasted in labour which must be extremely irksome to the lords ordinary, and which might, from its nature, be equally well performed by a clerk or other proper officer selected for the purpose. We would, therefore, recommend that the ordinaries should be relieved of all motions to be made merely with the view of furthering the preparation of cases ; and that this business should be conducted before the clerks, subject always to an appeal to the Lord Ordinary ; but under such regulations, as to the imposition of expenses, as to check unnecessary and improper appeals."

Evid., p. 76.  
Q. 957.

## Appendix (E.)

## Appendix (E.)

Evid., p. 77,  
Q. 966.

EXTRACT from the EVIDENCE of *Patrick Shaw, Esq.*

"The great impediment to the despatch of business is the motion roll. On this matter I refer to my answers to the former queries. As the Commissioners have not adopted the suggestion there made as to the appointment of an officer who should devote his attention to motions, &c., I would propose that all motions should, in the first instance, be made by the agents before one of the principal or deputy clerks,—that, if there be no appearance after due intimation, the motion should be granted as a matter of course; but that if it be opposed, the clerk should either decide it, or report to the Lord Ordinary; that if he decide it, that it shall be competent, within a very limited period, to bring it under review of the Lord Ordinary by motion, and that his decision shall not be subject to review of the inner house, except on payment of expenses, as in the case of preliminary defences. A suggestion to this effect, I observe, is made by the Commissioners, in their Report of 2d May 1834; and I am not aware of anything else by which the business of the outer house can, with due regard to justice, be expedited."—Appendix to Report of Law Commissioners (Scotland), page 12.

## Appendix (F.)

## Appendix (F.)

Evid., p. 151,  
Q. 1814.

EXTRACT from the SPEECH of the Right honourable *Charles Hope*, Lord President of the Court of Session, on moving the Court to pass Acts of Sederunt for the better regulating of the Forms of Process in the Courts of Law in Scotland, 12 November 1825.

"IN regard to the inner house, where from this day forward every judgment becomes final, the utmost degree of caution and deliberation becomes peculiarly necessary. Therefore, in cases of difficulty, even although we should be unanimous, but still more when there is a difference of opinion among us, I would humbly recommend that we should not pronounce our interlocutor *instantly*, but should allow the cause to stand over for a few days, that we may have time and opportunity to reflect on our own opinions, and on those of our brethren who have differed from us."

## Appendix (G.)

## Appendix (G.)

Evid., p. 171,  
Q. 2079.

Edinburgh, 6th February 1840.

At a Meeting of the SOCIETY of WRITERS to Her Majesty's Signet held this day, "to take into consideration the Notice which has been given in Parliament not to fill up at present the vacancy on the Bench caused by the resignation of Lord *Glenlee*," the following Resolutions were moved by Mr. *William Young*, seconded by Mr. *Storie*, and unanimously adopted:—

I. THAT this Society, as a constituent part of the College of Justice, and as consisting of individuals who conduct a very large proportion of the business carried on before the Supreme Courts of Scotland, and who have therefore the most ample opportunities of forming a judgment on such matters, has a deep interest in those measures which affect the administration of justice, and has from time to time been called on to express an opinion on the numerous and important changes which, particularly of late, have taken place in the constitution and forms of procedure of those courts.

II. That of late years a great variety of changes have taken place in the Supreme Courts of Scotland, founded in part upon various Reports submitted to Parliament by a Commission appointed by the Crown in August 1834, directing certain persons therein named to make a diligent and full inquiry into various matters relative to the law and administration of justice in Scotland; and in particular,—

1st. As to the arrangement of judicial business in the Court of Session and other Courts.

2dly. As to the execution of the duties formerly discharged by the Commissary Court, but now transferred by statute to the Court of Session.

3dly. As to the execution of the duties formerly discharged by the Admiralty Court, now transferred by statute to the Court of Session.

4thly. As to the execution of the duties of the Court of Session in Scotland.

III. That within the last few years the number of judges in the Court of Session has been diminished—the Court of Exchequer entirely abolished, and the duties of that court laid upon two of the judges of the Court of Session. That the Admiralty and Commissary Courts have also been abolished, and the duties previously performed by the judges of those courts transferred to the judges of the Court of Session, while at the same time numerous changes have taken place, both in the administration of the law, and in the forms of procedure before the Court of Session.

IV. That while the society would acknowledge that some of those changes, and in particular those which have tended to diminish the expense and delay of litigation, have been productive of the best effects—still the frequency and extensive nature of many of the alterations have tended to a considerable extent to diminish the confidence of the suitors in the mode of administering justice in Scotland—have occasioned great litigation and expense, in consequence of the numerous questions which have occurred connected with the new and constantly varying forms of process—and have subjected the legal profession and their clients generally to many and serious hardships.

V. That



V. That the number of judges for carrying on the business of the inner and outer house, as fixed by the existing statutes, appears to the society to be not more than is indispensably necessary for conducting the business of the Court of Session in an efficient and satisfactory manner.

VI. That, therefore, the proposal of not supplying the vacancy which has recently occurred on the Bench appears to the society not only to be contrary to the existing statutes recently passed, after the most full and deliberate consideration, and calculated again to unhinge a system which, after successive changes, is only now coming to work its own settlement, but to be fraught with many and serious practical evils; among which the following may be noticed:—

In the first place, by reducing the number of judges to twelve, it may happen in those cases in which all the judges are consulted (of late of frequent occurrence), that there may be an equality of votes, without any law to regulate what is to take place in such an event.

2dly. If one of the present lords ordinary shall be taken to the inner house, the business of the outer house must be conducted by four lords ordinary, although it is notorious to all that there is at present more than a sufficient amount of business to occupy the five lords ordinary.

3dly. If, on the other hand, the lords ordinary shall continue as at present, and the vacancy in the inner house remain unsupplied, the suitors in one division will have their causes decided by only three judges. Should any of the three be laid aside by illness, the business of that division must either stop, or one of the lords ordinary be called in from his duties in the outer house, to the serious interruption of the business there. Besides, in the case of difference of opinion among the three judges, a decision by two to one would not give satisfaction; and in reversing a lord ordinary's judgment, two to one of the inner house judges would, in fact, be equivalent to an equality of votes, which would necessarily operate as a strong temptation to suitors to appeal.

VII. That it is of great importance to give time for a thorough appreciation of the many changes which have of late taken place in the constitution and forms of procedure in the Supreme Court of Scotland; and with that view, and in accordance with the existing statutes, the society would earnestly but respectfully press upon Government the importance and necessity of immediately filling up the existing vacancy on the Bench.

VIII. That copies of these resolutions be forthwith printed, and transmitted to the Lord Chancellor, the Marquess of Normanby, Lord John Russell, the Keeper of the Signet, the Lord Advocate, Sir Robert Peel, and also to all Members of both Houses of Parliament connected with Scotland.

### Appendix (H.)

COPY of EXTRACTS from ACT of SEDERUNT, 11th January 1604.

Appendix (H.)

For removing of that impediment of proceeding in the utter-hous, (that the procurator is thair ben,) it is appointit to be the saidis lordis, that thair sal be fyftein advocattis nominat, quha sal be appointit for the inner-hous, and quahatever client sal haif occasion to employ ony of these, in ony action to be decydit in the utter-hous, the saime client is heirby willit and advysit to provyd himself of ony uther advocat, not being of the noumer forsaid, that in caise the tyme of the calling of his matter, his principal advocat be in the inner-hous, that nevertheless the uther may be redie to disput the saime, before the ordinar in the utter-hous, and the excuis, (that the uther procurator is thair ben,) sal procure na delay, but present process sal be grantit: The names of quhilk fyftein advocattis appointit for the inner-hous followis; Mr. John Sharp; Mr. Thomas Craig; Mr. William Oliphant; Mr. John Nicolsone; Mr. Alexander King; Mr. John Russell; Mr. Thomas Henderson; Mr. James Davidson; Mr. Robert Lintoun; Mr. Richard Spence; Mr. Henry Balfour; Mr. John Dempster; Mr. Oliver Colt; Mr. Robert Leirmouth; Mr. Lawrence Macgill.

Evid., p. 203,  
Quest. 2522.

It is our plesure, for the better expedition of justice, that, in the beginnand of ilk session, the Chancellor and Presedent caus ane roll be maid of all causis to be callit, the causis that war callit and left aff in the former session to be first in the roll, the rest to be takin in as thay are gevin, ather be the parties or thair procurators, and to be added to the said roll, and that na caus quhilk is ains callit be put out quhil it be put to some end, and if ony caus is left at the ane day, that the same be preceislie first callit the next day.

Evid., p. 203,  
Q. 2527.

That the said roll be affixt the first day of ilk month, that all pairties may be sure quhan to await the calling, and that this order be preceislie keipit, as the Chancellor and President will be answerable to us.

Evid., p. 204,  
Q. 2529.

Item, For the spedier dispatche, it is our plesure, that the President, quhan onie matter is callit according to the roll, put the men of law to ane poynt, suffer thame not to tyne tyme with idle discoursis to the prejudice of uther parteis, and that the Chancellor-command-onlie the matters to be callit according to the roll, and quhan ony caise is sufficietlie ressonit, that he speir the voitis.

Evid., p. 204,  
Q. 2536.

## ACCOUNTS respecting APPEALS and WRITS of ERROR.

## Appendix (I.)

Appendix (I.)

AN ACCOUNT of the Number of APPEALS presented, heard and decided on, in each Session, from the 14th of March 1823 to the present time; distinguishing the Number of *Scotch*, *English*, *Irish* and *Welsh* in each Session respectively.

SESSION	Presented.					Heard.					Decided.				
	Scotch.	English.	Irish.	Welsh.	Total.	Scotch.	English.	Irish.	Welsh.	Total.	Scotch.	English.	Irish.	Welsh.	Total.
1823, from March 14th	28	7	3	-	38	8	5	3	-	16	8	3	3	-	14
1824 - - -	41	5	7	-	53	67	6	8	1	82	45	5	7	1	58
1825 - - -	35	15	8	-	58	64	10	9	1	84	55	10	9	-	74
1826 - - -	42	3	8	-	53	42	-	6	-	48	35	-	4	1	40
1826-27 - - -	57	14	9	-	80	26	12	10	-	48	21	9	7	-	37
1828 - - -	55	9	4	1	68	21	11	6	-	38	18	9	5	-	32
1829 - - -	39	7	1	-	47	18	2	4	-	24	17	3	2	-	5
1830 - - -	55	14	4	1	74	41	6	6	-	53	28	3	4	-	7
1830-31 - - -	38	6	1	-	45	43	4	3	-	50	37	3	3	-	43
1831 - - -	34	6	1	-	41	43	5	3	-	51	28	4	6	1	39
1831-32 - - -	51	16	9	-	76	19	11	-	-	30	17	4	-	-	21
1833 - - -	49	17	3	-	69	29	8	-	-	37	25	6	-	-	31
1834 - - -	31	4	6	-	41	7	22	6	-	35	14	24	6	-	44
1835 - - -	19	5	1	-	25	45	6	7	-	58	42	3	7	-	52
13th June 1836 -	24	11	10	-	45	4	7	2	-	13	1	2	-	-	3
	598	139	75	2	813	477	115	73	2	667	391	88	63	3	500

## Appendix (K.)

Appendix (K.)

AN ACCOUNT of the Number of WRITS of ERROR presented, non-pros'd, heard and decided on, in each Session, from the 14th of March 1823 to the present time; distinguishing the Number of *Scotch*, *English* and *Irish* in each Session respectively.

SESSION	Presented.				Non-pros'd.				Heard				Decided.			
	Scotch.	English.	Irish.	Total.	Scotch.	English.	Irish.	Total.	Scotch.	English.	Irish.	Total.	Scotch.	English.	Irish.	Total.
1823, from March 14th	-	5	-	5	-	2	-	2	-	3	-	3	-	2	-	2
1824 - - -	-	9	1	10	-	2	-	2	-	9	-	9	-	6	-	6
1825 - - -	-	17	-	17	-	10	-	10	-	7	-	7	-	4	1	5
1826 - - -	-	6	1	7	-	1	1	2	2	3	1	6	-	2	-	2
1826-27 - - -	-	6	-	6	-	-	-	-	-	6	-	6	-	7	-	7
1828 - - -	-	11	1	12	-	-	-	-	-	5	1	6	-	4	1	5
1829 - - -	-	2	3	5	-	-	-	-	-	3	1	4	-	2	1	3
1830 - - -	-	3	4	7	-	1	-	1	-	5	-	5	-	4	-	4
1830-31 - - -	-	-	4	4	-	-	-	-	-	3	4	7	-	3	3	6
1831 - - -	-	-	-	-	-	-	-	-	-	3	-	3	-	2	-	2
1831-32 - - -	-	3	-	3	-	-	-	-	-	5	-	5	-	7	1	8
1833 - - -	-	2	-	2	-	-	-	-	-	1	-	1	-	4	-	4
1834 - - -	1	6	2	9	-	-	-	-	-	4	-	4	-	5	-	5
1835 - - -	-	2	-	2	-	-	-	-	-	5	-	5	-	6	-	6
13th June 1836 -	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	1	72	16	89	-	16	1	17	2	62	7	71	-	58	7	65

Appendix

## Appendix (L.)

TABULAR VIEW of the BUSINESS before the LORDS ORDINARY, in the COURT of SESSION, during the Winter Session, 1839-1840.

Appendix (L.)

## I.—NEW CAUSES, DEFENDED and UNDEFENDED.

SESSION.	Week.	Lord Moncrieff.		Lord Jeffrey.		Lord Cockburn.		Lord Cuninghame.		Lord Murray.		TOTAL.	
		Defended.	Undefended.	Defended.	Undefended.	Defended.	Undefended.	Defended.	Undefended.	Defended.	Undefended.	Defended.	Undefended.
1839:													
November - 4	1	6	7	2	5	3	13	9	14	-	4	20	43
"    - 11	2	2	1	5	9	15	6	15	23	1	8	38	47
"    - 18	3	-	12	5	7	3	14	14	22	3	2	25	57
"    - 25	4	5	6	11	6	2	7	18	25	-	5	36	49
December - 2	5	9	4	8	4	2	10	15	9	1	5	36	32
"    - 9	6	6	2	10	7	7	9	10	8	2	2	35	28
"    - 16	7	2	2	7	6	7	11	12	10	3	4	31	33
1840:													
January - 13	8	4	1	2	2	5	9	14	15	-	1	25	28
"    - 20	9	3	2	2	7	1	17	21	18	1	-	28	44
"    - 27	10	1	-	3	-	2	3	5	9	1	1	12	13
February - 3	11	-	9	6	1	6	6	14	14	5	3	31	33
"    - 10	12	3	1	7	3	1	4	12	8	4	1	27	17
"    - 17	13	-	-	4	2	4	3	13	11	4	1	25	17
"    - 24	14	1	1	4	2	6	4	12	12	3	4	26	23
March - 2	15	-	3	3	1	1	8	11	13	1	1	16	26
"    - 9	16	-	2	4	2	2	13	9	11	1	4	16	32
"    - 11	17	-	-	-	4	-	-	-	-	-	-	-	4
"    - 13		-	-	-	-	-	1	-	-	-	-	-	1
"    - 14		-	4	-	-	-	1	-	1	-	1	-	7
"    - 16		18	2	2	4	2	6	8	20	10	-	-	32
"    - 17	-	-	5	-	1	-	-	-	1	-	-	-	7
"    - 18	-	-	1	-	-	-	-	-	1	-	4	-	6
"    - 19	-	-	-	-	2	-	1	-	2	-	-	-	5
"    - 20	-	-	1	-	-	-	6	-	5	-	-	-	12
		44	66	87	73	73	154	224	242	30	51	458	586

II.—STATE of the MOTION ROLL, as called by each of the LORDS ORDINARY, on the First Day of the Week of his being out.

SESSION.	Week.	Lord Moncrieff.	Lord Jeffrey.	Lord Cockburn.	Lord Cuninghame.	Lord Murray.	TOTAL.	Jury Motions.
1839:								
Nov. - 1	1	- 8 -	- 20 -	- 8 -	- 8 -	- - -	44	-
" - 2	-	- - -	- - -	- - -	- - -	- 10 -	10	-
" - 5	2	- 15 -	- 22 -	- - -	- 15 -	- 14 -	66	3
" - 6	-	- - -	- - -	- 7 -	- - -	- - -	7	-
" - 12	3	- 5 -	- 19 -	- - -	- 15 -	- 10 -	54	2
" - 13	-	- - -	- - -	- 10 -	- - -	- - -	10	-
" - 19	4	- 12 -	- 21 -	- - -	- 43 -	- 11 -	87	3
" - 20	-	- - -	- - -	- 7 -	- - -	- - -	7	-
" - 26	5	- 14 -	- 12 -	- - -	- 26 -	- 13 -	65	2
" - 27	-	- - -	- - -	- 7 -	- - -	- - -	7	-
Dec. - 3	6	- 18 -	- 19 -	- - -	- 33 -	- 13 -	83	3
" - 4	-	- - -	- - -	- 16 -	- - -	- - -	16	-
" - 10	7	- 14 -	- 23 -	- - -	- 34 -	- 18 -	89	4
" - 11	-	- - -	- - -	- 19 -	- - -	- - -	19	-
" - 17	8	- 20 -	- 24 -	- - -	- 48 -	- 16 -	108	-
" - 18	-	- - -	- - -	- 14 -	- - -	- - -	14	-

O.45.

N H 4

(continued.)

App. (L.)—II. STATE of the Motion Roll, as called by each of the Lords Ordinary, &c.—*continued.*

SESSION.	Week.	Lord Moncrieff.	Lord Jeffrey.	Lord Cockburn.	Lord Cuninghame.	Lord Murray.	TOTAL.	Jury Motions.
1840 :								
Jan. - 14	9	- 14 -	- 23 -	- - -	- 37 -	- 11 -	85	4
" - 15	-	- - -	- - -	- 12 -	- - -	- - -	12	-
" - 21	10	- 13 -	- 24 -	- - -	- 32 -	- 7 -	76	5
" - 22	-	- - -	- - -	- 15 -	- - -	- - -	15	-
" - 28	11	- 12 -	- 19 -	- - -	- 46 -	- 20 -	97	2
" - 29	-	- - -	- - -	- 13 -	- - -	- - -	13	-
Feb. - 4	12	- 12 -	- 29 -	- - -	- 29 -	- 20 -	90	7
" - 5	-	- - -	- - -	- 13 -	- - -	- - -	13	-
" - 11	13	- 9 -	- 26 -	- - -	- 39 -	- 8 -	82	5
" - 12	-	- - -	- - -	- 6 -	- - -	- - -	6	-
" - 18	14	- 20 -	- 13 -	- - -	- 44 -	- 10 -	87	9
" - 19	-	- - -	- - -	- 11 -	- - -	- - -	11	-
" - 25	15	- 13 -	- 31 -	- - -	- 60 -	- 18 -	122	7
" - 26	-	- - -	- - -	- 10 -	- - -	- - -	10	-
March 3	16	- 21 -	- 22 -	- - -	- 43 -	- 14 -	100	10
" - 4	-	- - -	- - -	- 17 -	- - -	- - -	17	-
" - 10	17	- 12 -	- 33 -	- - -	- 53 -	- 17 -	115	7
" - 11	-	- - -	- - -	- 23 -	- - -	- - -	23	-
" - 17	18	- 18 -	- 28 -	- - -	- 62 -	- 19 -	127	8
" - 18	-	- - -	- - -	- 23 -	- - -	- - -	23	-
TOTAL - -	-	- 250 -	- 408 -	- 231 -	- 667 -	- 249 -	1,801	81

## Appendix (M.)

Appendix (M.) RETURN, showing, in Columns, the Number of CAUSES decided by the TEIND COURT during each of the last Ten Years respectively, apart from Motions and Matters of Form.

	Causes decided by the Court in its Ministerial capacity.	Causes brought before the Court in its Judicial capacity, decided by the Lord Ordinary, and final, when not subjected to Review of one or other of the Divisions of the Court of Session as a Court of Teinds.	Total Causes decided in the Court of Teinds.	Decisions by the Lord Ordinary, but subjected to Review, and finally determined by the Court.	Total Decisions by the Court and Lord Ordinary.
From 12 May 1830 to 12 May 1831 -	- 40 -	- 123 -	- 163 -	- 5 -	- 168
From 12 May 1831 to 12 May 1832 -	- 25 -	- 93 -	- 118 -	- 3 -	- 121
From 12 May 1832 to 12 May 1833 -	- 19 -	- 85 -	- 104 -	- 3 -	- 107
From 12 May 1833 to 12 May 1834 -	- 19 -	- 69 -	- 88 -	- 8 -	- 96
From 12 May 1834 to 12 May 1835 -	- 20 -	- 80 -	- 100 -	- 2 -	- 102
From 12 May 1835 to 12 May 1836 -	- 27 -	- 50 -	- 77 -	- 6 -	- 83
From 12 May 1836 to 12 May 1837 -	- 14 -	- 58 -	- 72 -	- 12 -	- 84
From 12 May 1837 to 12 May 1838 -	- 13 -	- 54 -	- 67 -	- 6 -	- 73
From 12 May 1838 to 12 May 1839 -	- 15 -	- 49 -	- 64 -	- 7 -	- 71
From 12 May 1839 to 12 May 1840 -	- 13 -	- 29 -	- 42 -	- 5 -	- 47

Edinburgh, 4 April 1840.

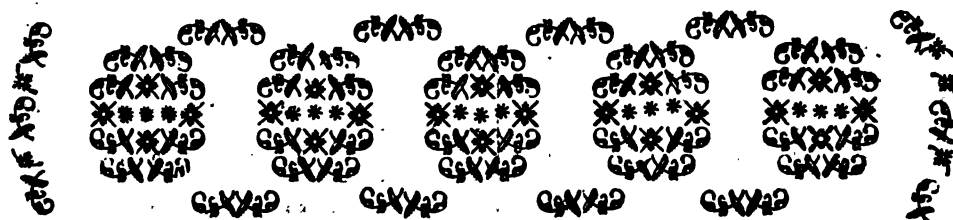
Sylvester Reid, Clerk of Teinds.

The Clerk finds it impossible for him to form any recollection of the average time of sitting of the Court on each Court-day, as he never noted the time so occupied. He may, however, mention, that the time taken up in advising reclaiming Notes is very considerable, and the more so as frequent delays and adjournments take place.

## Appendix (N.)

## Appendix (N.)

Evid., p. 88,  
Q. 1177.



A

## B I L L

F O R

Augmenting the Salaries, and Lessening the Number,  
of the Judges in the Courts of Session and Ex-  
chequer, in that Part of *Great Britain* called  
*Scotland*.

Note.—The Figures in the Margin denote the Number of the  
Folios in the written Copy.

WHEREAS the Salaries of the Judges in the  
Courts of Session and Exchequer, in *Scotland*, are  
inadequate to the Dignity and Importance of their  
Offices:

And whereas, by the Fifteenth Article of the Treaty of Union  
between *England* and *Scotland*, the Amount of the Revenues of  
Customs and Excise, payable in *Scotland* before the Union, was  
declared to be Sixty-three thousand Five hundred Pounds *per*  
*Annum*; and by different Acts of Parliament, which passed subse-  
quent to the Union, particularly an Act made in the Tenth Year

A

of

[ 2 ]

- 2 of the Reign of Queen *Anne*, intituled, " An Act for laying additional Duties on Hides, and other Articles therein mentioned, and for obviating certain Doubts concerning Payments in *Scotland*," it is *inter alia* Enacted, " That the Fees, Salaries, and other Charges, allowed or to be allowed by her Majesty, her Heirs or Successors, for keeping up the Courts of Session and Justiciary, and Exchequer Court, of *Scotland*, are and may be chargeable upon any Parts of the said Customs and Excise, preferable to all other Payments whatsoever, the Charge of Management excepted, but so as not anyways to prevent any Application of the Excrescence out of the said Customs and Excise, appointed by any former Laws :"

And whereas the Court of Session, in its present Form, consists of a President and Fourteen ordinary Lords, of whom Nine, including the President, make a Quorum ; but so great a Number of Judges is not necessary for the Dispatch of Business in that Court :

- And whereas, by the Nineteenth Article of the Treaty of Union, between *England* and *Scotland*, it is *inter alia* declared, " That the Court of Session, or College of Justice, do, after the Union, and notwithstanding thereof, remain, in all Time coming, within *Scotland*, as it is now constituted by the Laws of that Kingdom, and with the same Authority and Privileges as before the Union, subject nevertheless to such Regulations, for the better Administration of Justice, as shall be made by the Parliament of *Great Britain* :"
- 3

And whereas a reasonable Diminution of the Number of the Judges, and making suitable Variations upon the present Forms of Proceeding in the said Court of Session, consistently with the Laws of *Scotland*, and with the Principles of the Constitution of that Court, would not only render it more easy to provide competent Salaries to the remaining Judges, but would also in other respects tend to the better Administration of Justice :

And whereas the Place of One of the said Judges in the Court of Session has become vacant by the Death of *Robert Bruce*, of *Kennet* :

- And whereas, by an Act made in the Sixth Year of the Reign of Queen *Anne*, intituled, " An Act for settling and establishing a Court of Exchequer in the North Part of *Great Britain*, called *Scotland*,"
- 4

[ 3 ]

"*Scotland*," it is *inter alia* declared, that the Number of the Barons of said Court shall not at any Time exceed Five; which Number has been in Use to be appointed, although the Business of that Court may be executed by a smaller Number :

May it therefore please Your MAJESTY,

That it may be Enacted; ~~And be it Enacted~~ by the KING's Most Excellent MAJESTY, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the                      Day of                      there shall be issued, paid, and applied, in every Year, out of the Monies that shall arise from Time to Time from any the Duties and Revenues, in that Part of *Great Britain* called *Scotland*, which by the aforesaid Act, made in the Tenth Year of the Reign of Queen *Anne*, were charged or made chargeable with the payment of the Fees, Salaries, and other Charges, allowed or to be allowed by her Majesty, her Heirs or Successors, for keeping up the Courts 5 of Session, Justiciary, and Exchequer in *Scotland* the several Salaries following to the Judges after-mentioned; (that is to say) The Sum of                      to the Lord President of the Court of Session for the Time being; the Sum of                      to each of the other Judges of the Court of Session for the Time being; the Sum of                      to the Lord Chief Baron of the Court of Exchequer in *Scotland* for the Time being; and the Sum of                      to each of the Puisne Barons of the said Court of Exchequer for the Time being: Which several and respective Sums shall be paid, in every Year, at such Time or Times, and in such Manner, as the Fees, Salaries, and other Charges of keeping up the said Courts, have accustomedly been paid, since the Union of the Two Kingdoms, and the same shall be in Place of the different Salaries and Allowances which the said Judges do at present, or have been in Use to enjoy, excepting any additional Sum in Use to be granted, 6 by Warrant from His Majesty, to One of the Puisne Barons of the said Court of Exchequer, when appointed to that Office from the Bar of *England* :

And, in order that the Court of Session may be reduced to the Number of                      Judges, including the Lord President; and the said Court of Exchequer to the Number of                      Barons, including

B



[ 4 ]

including the Lord Chief Baron; **Be it Enacted**, by the Authority aforesaid, That the Place now vacant by the Death of the said *Robert Bruce*, as One of the ordinary Judges in the Court of Session, shall not be filled up; and whenever the Place or Places of any of the present Judges in the Court of Session (excepting always the Lord President, and those who are also Judges of Justiciary) shall at any Time or Times hereafter become vacant, no new Warrant or Nomination of any Person or Persons whatsoever shall be issued or made by His Majesty, His Heirs or Successors, to supply the first of such Vacancies, or any of the said and whenever the Place or Places of any of the present Barons of the said Court of Exchequer (excepting the Lord Chief Baron) shall at any Time or Times hereafter become Vacant, no new Warrant or Nomination of any Person or Persons whatsoever shall be issued or made by His Majesty, His Heirs or Successors, to supply the first of such Vacancies, or any of the said and if any such Warrant or Nomination shall at any Time hereafter happen to be made in either Court, contrary to the Provisions of this Act, the same is hereby declared to be null and void, any former Law or Practice to the contrary notwithstanding.

7

**Provided always, and be it Enacted and Declared**, That when the Place or Places either of the Lord President of the Court of Session, or any of the Judges in the said Court, who are also Judges of Justiciary, or of the Lord Chief Baron of the said Court of Exchequer, become at any Time vacant, such Place or Places may be filled by new Appointments to these respective Offices as heretofore.

**And be it Enacted** by the Authority aforesaid, That whenever the Number of Judges of the Court of Session including the Lord President, shall be reduced to which is in all Time thereafter to be the established Number of the Court, the Quorum shall be including the President or Presiding Judge for the Time, and shall so continue in all Time thereafter.

8

**And whereas** the Lord President, and the other Judges of the Court of Session, are possessed of a Fund, called *The Stock of the Court*, by Grants before the Union, amounting to Twenty-two thousand Seven hundred Pounds of Capital Money, the Yearly Interest of which they have been in Use to divide as a Part of their Provision, but which Sum ought now to be restored to the Public,

[ 5 ]

Public, in Consideration of the Salaries hereby granted ; **Be it Enacted** by the Authority aforesaid, That the said Capital Sum shall, on or before the                      Day of                      in the Year One thousand Seven hundred and                      be paid in to the Receiver General of His Majesty's Revenue in *Scotland*, with Interest upon the same, at Five *per Cent. per Annum*, from the                      Day of                      in the Year One thousand Seven hundred and                      until Payment, in order to be by him remitted to the Exchequer in *England*, for the Use of the Public ; and the Receiver General for the Time being is hereby authorized and required to take all legal Steps, if necessary, for recovering the same.

**And be it Enacted** by the Authority aforesaid, That the 9 Judges of the Court of Session shall continue to meet for the Space of a Fortnight, in the next Autumn Vacation, immediately after the Summer Session, in order to revise the Forms of Proceeding in the said Court, and by an Act or Acts of Sederunt to regulate the said Forms, and particularly to adapt them to the Change which the Diminution of the Number of the Judges will occasion, and thereafter, from Time to Time, as Occasion may require, to adjust and regulate the said Forms by similar Acts of Sederunt of the Court.

A

B I L L

F O R

Augmenting the Salaries, and Lessening the  
 Number, of the Judges in the Courts of  
 Session and Exchequer, in that Part of  
*Great Britain* called *Scotland*.

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 25 Geo. III.

1785.

## Appendix (O.)

A RETURN of the Number of CAUSES appealed to The House of Lords from the Court of Session within the last Twenty Years; showing those which were reversed, those affirmed, and those remitted for further Consideration.

Appendix (O.)

YEARS.	Number presented.	Affirmed.	Affirmed and remitted.	Affirmed in part, and reversed in part.	Reversed.	Reversed and remitted.	Remitted.	Withdrawn, abated, not prosecuted, not yet heard, &c.
1820 First Session	3	2	-	-	-	-	-	1
1820 Second Session	21	7	-	-	1	3	2	8
1821	51	28	3	-	2	2	2	14
1822	45	15	-	-	3	7	2	18
1823	52	23	2	-	8	2	4	13
1824	36	15	-	1	8	1	2	9
1825	30	9	-	1	2	1	4	13
1826	39	19	-	3	3	2	4	8
1826-7	54	28	-	2	4	1	3	16
1828	51	20	-	-	9	3	2	17
1829	39	14	-	-	3	2	2	18
1830	53	27	3	-	3	2	-	18
1830-1	33	19	-	1	2	6	-	5
1831	30	14	2	-	1	5	-	8
1831-2	49	23	1	-	1	3	-	21
1833	45	18	-	-	5	3	-	19
1834	29	12	1	-	4	1	1	10
1835	36	14	-	-	1	3	4	14
1836	31	14	1	-	1	2	-	13
1837	43	18	-	-	3	-	2	20
1837-8	46	14	-	1	4	-	-	27
1839	34	1	-	-	1	1	-	31
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**ACCOUNTANTS.** Objections on the ground of expense and otherwise to the present practice of remitting matters of figures to accountants, who sometimes report their opinions on matters of law and evidence, *Alexander*, 435-439—The present practice of giving remits to accountants causes delay and expense; it could be altered by Act of Sederunt, *Darling*, 1093, 1094.

**Acts of Parliament.** Alterations made with regard to the constitution of the Court of Session by Acts 48 Geo. 3, c. 151; 50 Geo. 3, c. 112; 6 Geo. 4, c. 120; 11 Geo. 4 & 1 Will. 4, c. 69, and 2 & 3 Vict. c. 36, *Lord Advocate*, 7-10—Examination upon the different legislative enactments that have taken place since 1808, and whether in the mass they have been beneficial, *Thomson*, 325-327—The acts passed since 1833 have been useful, *Stodart*, 1837, 1838—The alterations have been all improvements, but it would have been better had they been enacted at one time, *Miller*, 2300.

The repeated experimental changes that have been made by Parliament on the form and constitution of the Court of Session is one cause of the diminution of business therein, *Alexander*, 395—The operation of legislative interference on the Court of Session has been extremely prejudicial to the interests of justice, *Dean of Faculty*, 1452—Frequent changes produce great evil and inconvenience, *G. J. Bell*, 2782—How far legislative interference necessary for carrying into effect suggestions of Committee, *Rep. x.*—Objections to further legislative interference; it would re-open incidental questions which have just been disposed of, *Solicitor-General of Scotland*, 2812—The remedies suggested of not giving the record to the judges, and not giving an opinion upon the day on which the cause is heard, should not be laid down as a rigorous rule by legislative enactment, *Solicitor-General of Scotland*, 2818-2821—Objection to constant discussions and legislative enactments to improve a system which has not had time to get into fair work, and which ought only to be altered by acts of sederunt, *Solicitor-General of Scotland*, 2841-2847.

See also *Acts of Sederunt. Appeals to the Court of Session. Judicature Act. Law Commission. Lords Ordinary. Preparation of Causes. Points of Form. Record. Session, Court of, 1. Sittings, 1. Writs.*

**ACTS OF SEDERUNT:**

1. *Generally, and necessity for revision therein.*
2. *How far the Judicature Act prevents alterations therein.*
3. *Papers laid before the Committee.*

1. *Generally, and necessity for revision therein.*

The practice of acts of sederunt, containing matters and principles of law, was dangerous in principle, and has ceased a great many years, *Lord Advocate*, 26-29—Observations thereon, *Mr. Wallace's proposed Report, Proc. in Com. p. xx.*—No disparagement to the judges that the acts of sederunt which they were bound to make for their own procedure should, in the course of a great number of years, have given rise to so many questions, *Lord Advocate*, 104—An abridgment of the acts of sederunt, from the institution of the court in 1532 to 1837, published by witness, with the approbation of the court, *Alexander*, 375-380—The judges in 1810 gave reasons for not supplying the House of Lords with copies of their acts of sederunt then in force, *Alexander*, 381-388.—Observations thereon, *Mr. Wallace's proposed Report, Proc. of Com. p. xx.*—Report of the Judges of the Court of Session to the House of Lords on order for copies of acts of sederunt, 27 February 1810, *Mr. Wallace's proposed Report, Proc. of Com. p. xxi.*; *App. p. 239.*

They are not revised sufficiently often, *Mr. Wallace's proposed Report, Proc. of Com. p. xx.*; *Waddell*, 628-636; *Darling*, 1088. 1090; *Stodart*, 1822-1824—Advantage that would result if practitioners as well as the bar were consulted in drawing acts of sederunt, *Stodart*, 1825-1827—How far the court have followed the plan of the clause in the Bill of Sir Islay Campbell, in 1785, of revising acts of sederunt as occasion might require, *Solicitor-General of Scotland*, 2848-2851—Observations thereon, *Mr. Wallace's proposed Report, Proc. of Com. p. xx.*

2. *How far the Judicature Act prevents alterations therein.*

The Judicature Act tied up the form of proceeding too tightly in not allowing the court to make acts of sederunt for its own practical guidance, *Rep. v.*; *Lord Advocate*, 26; *Thomson*, 328; *Dean of Faculty*, 1260-1263; *Miller*, 2271; *G. J. Bell*, 2629-2633.

**ACTS OF SEDERUNT:—2. How far the Judicature Act prevents alteration therein—contd.**  
 2650–2654. 2731–2739—It would be advantageous if some of the rigidity of existing statutes were diminished by greater discretionary power in the court to reform the minute parts of its proceedings, *Thomson*, 324; *Miller*, 2272—The reason why certain forms have not been altered is a doubt whether a clause in the Judicature Act does not prevent as much being done as could be wished, *Dean of Faculty*, 1260—Opinion that the court possesses sufficient power under the late Acts of Parliament of making acts of sederunt for all purposes for carrying those Acts of Parliament into effect, *Sir William Rae*, 155; *Alexander*, 566–573; *Waddell*, 628–636.

Power should be enlarged; acts of sederunt not to come into force till after being submitted to Parliament, *Rep. v.*—Powers of the court with regard to acts of sederunt, and to what extent an Act of Parliament would be required to carry the recommendations of the Law Commission into effect, *Darling*, 967–971; *G. J. Bell*, 2782–2784—Opinion that an act of sederunt would be quite sufficient to enable an agent to move for all decrees in absence, and to make motions in the motion rolls, *Alexander*, 453–454—Further evidence upon acts of sederunt as to putting out the roll, postponing causes from the absence of counsel, &c., *R. Bell*, 2527–2536—In what manner the court might alter and have altered the common law and Acts of Parliament by means of acts of sederunt, *Darling*, 1043–1087. 1095–1108—Instances have occurred of acts of sederunt made to explain Acts of Parliament being themselves the subject of doubt, *Darling*, 1068—Further instance in which the court by act of sederunt have explained an Act of Parliament, without a power given them by that Act so to do, *Darling*, 1918–1927.

### 3. Papers laid before the Committee.

Report of judges of the Court of Session to the House of Lords, on the order of the House for copies of the acts of sederunt, *App. p.* 239—Extract from the speech of the Right Honourable Charles Hope, lord president of the Court of Session, on moving the court to pass acts of sederunt, 12 November 1825, *App. p.* 244—Copy extracts from acts of sederunt, 11 January 1604, relative to the distribution of the bar, *App. p.* 245.

See also *Judges of the Inner House*, III. *Judgments*, 2. *Jury Clerks. Records. Preparation of Cases. Sittings*, 1. *Tenants' Possessions*.

**Administration of the Law.** The manner in which the law is administered is one cause of the diminution of business in the Court of Session, *Alexander*, 395.

See also *Parole Argument. Rolls of Causes. Routine Business. Session Court*.

**Admiralty Court.** Abolished by 11 Geo. 4, and 1 Will. 4, and its sole civil jurisdiction vested in the Court of Session, *Rep. iv.*; *Lord Advocate*, 6; *Sir William Rae*, 143; *Waddell*, 639.

See also *Maritime Causes*.

**Admissions.** See *Facts*.

**Advocate Depute.** Powers of the advocate-depute in criminal trials, and on what occasions offenders are handed over to the sheriff, *Solicitor-General of Scotland*, 2901–2905.

**Advocation.** Proceedings before sheriffs brought in review before the Court of Session by means of, *Lord Advocate*, 93.

**Advocations and Suspensions.** Act for diminishing delay and expense in, passed 10 August 1838, and an act of sederunt explaining it was made 24 December, *Darling*, 1054—Manner in which agents have suffered from alterations with regard to, *Hunter*, 2015.

**Agents.** They cannot appear at the bar and plead in either the outer house or the inner house, *Thomson*, 239.

See also *Advocations and Suspensions. Jury Clerks*.

**Alexander, William.** (Analysis of his Evidence.) Writer to the signet since 1819, 352–354—Manner in which the judges of the inner house, previous to 1825, dealt with cases brought before them from the outer house, 356–358—They studied the cases out of court, and devoted a shorter time in court when they gave their judgment, 359—Though not satisfactory, it was more so than the present plan, as the judges were more fully aware both of the facts and law of the case than they are now, 360–361—It was expected from the change in 1825, that if the papers put before the inner house were more brief, the oral hearings would be longer, but which has not been the case, 362–366—If the spirit of the Act of 1825 were carried out, there would be ample work for both divisions, 367—There would be dissatisfaction if the number of judges were reduced, 368, 369—The public service requires the number of lords ordinary rather to be increased than diminished, 370.

The pursuer should have the choice of the lord ordinary, but not also of the inner chamber, 371—The option of lord ordinary could not be taken away with advantage; before it was allowed, it could always be done by a little management, 372, 373—If the business were conducted in the manner contemplated when the Judicature Act passed, one inner division would not be able to overtake the business, 374—An abridgment of the acts of sederunt from the institution of the court in 1532 to 1837, published by

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by the witness, with the approbation of the court, 375-380—The judges in 1810 gave reasons for not supplying the House of Lords with copies of their acts of sederunt then in force, 381-388—The choice of lord ordinary now allowed, and the means of obtaining it formerly, causes an accumulation of business before certain lords, 389-392—Cause of the diminution in the business of the Court of Session within the last 20 years, 393-395—Course of proceeding in an action in the outer house, 396-398—Objections to the lord ordinary's note, which should be constructed differently, 399-402—Mode of proceeding in the inner house when a judgment of the lord ordinary is brought under review, 403-411—The lords ordinary do not form their opinions from reading the record till they have heard counsel, 412, 413.

Comparative time the debates of counsel last in the outer house and inner house, 415-418—The counsel trust that the Judges of the inner house have mastered the facts from reading the record, which is the same as that before the outer house, with the exception of the lord ordinary's note, 418-420—There is greater propriety and necessity for an argument in the inner than in the outer house, 421—The inner house judges do not hear counsel as patiently and deliberately as the outer house judges, 422—The mode in which the inner house judges dispose of the cases brought under their review is not satisfactory to the suitors, 423—Manner in which the present system of review in the inner house originated, 424—Extract from the Report of the Law Commissioners against the mode of procedure in the inner house on reviewing judgments, 425—Impatience of the judges in hearing counsel is discouraging to counsel, 426—To whom commissions for the discovery of writings are now granted; objections to the system, and improvements suggested, 427-434.

Objections, on the ground of expense and otherwise, to the present practice of remitting matters of figures to accountants, who sometimes report their opinions on matters of law and evidence, 435-439—Causes which operate to prevent trial by jury being popular, particularly the expense, 440-442—Delay and expense to the suitors from absence of counsel at other bars, 444-448. 482-486—Opinion in favour of agents superseding counsel in all matters in what are termed motion-rolls of the lord ordinary, 449-473—Period and hours of sitting of the lords ordinary and the inner houses, 474-481—If the sessions were increased, the business would increase, 487—The vacations might be advantageously shortened, 488—Opinion that the appointment of new judges in the inner house would not of itself be sufficient to improve the system of hearing causes therein, 489, 490—Names of judges who have been transferred from the outer to the inner house in the last five years, 491-495—Doubtful whether lengthening the sessions would or would not decrease the arrears before certain lords ordinary, 496-512—How far the two divisions are satisfactory as producing uniformity of judgment, 513, 518, 519.

The hearing in the inner houses has been very little improved in the last two years, 520, 521—Causes should be heard there in the same manner as they are on appeal in the Lords, 522—Judges should have the papers as the Lord Chancellor has them, but they should be as much read after hearing counsel as before, 523—What the lord ordinary's note ought to contain, 524-526—Dissatisfaction of the suitors and profession at the proceedings in the inner house, which is well founded, 527-533—How far the judges do actually read the papers before giving their judgment; there is a general impression that they decide the causes without sufficient reading or hearing; if *vivâ voce* hearing were allowed to the extent intended by the Judicature Act, that impression would be wholly removed; 534-551—Further evidence upon the supposed reasons of the impatience of judges at hearing the arguments of counsel, 552-559—The question whether the senior or the junior judge should deliver his judgment first, could be settled by act of sederunt, 560-562—Whether allowing the judges to choose their divisions annually would be advantageous, 563, 564—Two inner chambers are sufficient, 565—Opinion that the court possesses sufficient power under the late Acts of Parliament of making acts of sederunt for all purposes for carrying those Acts of Parliament into effect, 566-573.

*Aliment, Action of.* Manner in which the inner house should be relieved from, *Hunter*, 1954. See also *Sheriff Courts*, 1.

*Appeals to the Court of Session.* Particulars relative to, and alterations that have been made therein by different statutes, *Lord Advocate*, 7—Appeals from justices of the peace, trials before juries, and appeals from surveyors of taxes are decided by the Court of Session, *Lord Advocate*, 61—Proceedings on appeals from the sheriff to the lords ordinary, to the inner house, and thence to the House of Lords, *Lord Advocate*, 92-102.

#### APPEALS TO THE HOUSE OF LORDS:

1. *Generally.*
2. *Number thereof, and causes of any increase.*
3. *Papers laid before the Committee.*

##### 1. *Generally.*

After two consecutive judgments in the inner house, the only remedy, previous to the Judicature Act, was by appeal, and which appeal was both in law and in fact, and made the



**APPEALS TO THE HOUSE OF LORDS:—1. Generally—continued.**

the proceedings almost interminable, *Lord Advocate*, 18, 19—Under the Judicature Act, no appeal lies to the House of Lords from a decision of the lord ordinary, unless it has previously been appealed against, and decided by one of the divisions of the Court of Session, *Rep.* iii.; *Lord Advocate*, 10; *Alexander*, 574, 575—They are now confined to the law of the case, *Lord Advocate*, 11—Nature of appeals to the House of Lords that have been stopped by recent arrangements in the Court of Session, under legislative enactment, *Lord Advocate*, 11—The origin of the Act 6 Geo. 4, c. 120, was a complaint by the House of Lords of the increase of appeals; grounds on which it was considered, in 1823, that appeals chiefly arose, *Sir William Rae*, 143.

**2. Number thereof, and causes of any increase.**

There are more from Scotland than from any other division of the empire, *Lord Advocate*, 130—Observations thereon, with accounts respecting appeals, 1823–1836, *Mr. Wallace's proposed Report, Proc. in Com. p.* xviii.—Cause of the number of appeals to the House of Lords, *Lord Advocate*, 130; *Waddell*, 612, 613; *Stodart*, 1672, 1673. 1806. 1875–1886—From the want of sufficient reasons for judgments, *Lord Advocate*, 130; *Waddell*, 612, 613—From the difference of opinion of judges in their judgments, *Stodart*, 1806. 1880—From the nature of the appellate jurisdiction of the House of Lords, *Lord Advocate*, 130. 132, 133—They are not often brought, on the speculation that the English Chancellor does not understand Scotch Law, *Stodart*, 1883, 1884—The Lord Advocate is not so well able to give a judgment on that point as a practical agent, as he does not come so immediately into collision with the parties, *Stodart*, 1885, 1886—The course of appeals to the House of Lords is a dissatisfaction with the judgment obtained, and the hope that a more deliberate hearing and an able mind applied to it will obtain redress, *Miller*, 2255.

They are increasing; causes thereof; *Stodart*, 1875. 1886—The Judicature Act has not diminished them, *Darling*, 1928—They would be diminished by having one chamber instead of two, *Stodart*, 1756; *G. J. Bell*, 2756—Also, if confidence were restored to the Scotch courts of review, *Miller*, 2261—They would be increased by reducing the number of judges below four, *Sir William Rae*, 151; *Robert Bell*, 2436.

**3. Papers laid before the Committee.**

An account of the number of appeals presented, heard and decided on in each session, from 14 March 1823 to 13 June 1836; distinguishing the number of Scotch, English, Irish and Welsh in each Session respectively, *App. p.* 246—A return of the number of cases appealed to the House of Lords from the Court of Session, 1820–1840, showing those which were reversed, those affirmed, and those remitted for further consideration, *App. p.* 255.

See also *Inner House*, 3, 4. *Judges of the Court of Session. Judgments*, 1. *Proofs upon Commission. Jury Trial. Records. Written Arguments.*

*Appendixes to Record.* See *Judges of the Inner House*, iv. 1.

*Arbitrations.* The number of them has increased from the dissatisfaction arising from the diversity of judgments pronounced by the two inner divisions, *Stodart*, 1672, 1673.

**ARREARS OF CAUSES:****1. Generally.****2. In the Inner House.****3. Before the Lords Ordinary.****4. Suggestions for preventing Arrears before Lords Ordinary.****1. Generally.**

Extent of arrears before the lords ordinary and the inner house, and causes, *Darling*, 929. 935—Table, showing the arrears of business in the Court of Session on the 1st January 1832–1840, made up from the annual Returns of Parliament, *Darling*, 1161—Return of the number of causes instituted and decided in the Court of Session in Scotland, between 1 January 1839 and 1840, showing the number of causes ready for judgment, but not disposed of at the last of these dates, *App. p.* 242.

**2. In the Inner House.**

To what extent there is an arrear of business in the inner house, *Dean of Faculty*, 1368, 1369—Observations thereon, *Mr. Wallace's proposed Report, Proc. in Com. p.* xvi.—The arrears of the inner house, second division, are very little, *Thomson*, 257—They would accumulate if there were but one division, *Thomson*, 204—Arrangements that might be made to prevent arrears in that event, *Hunter*, 2022–2025. 2066, 2067.

**3. Before the Lords Ordinary.**

Always an arrear of causes before the lords ordinary, *Lord Advocate*, 79—Increase therein before the lords ordinary, although the period of the session has been lengthened, *Sir William Rae*, 152—Extent of arrears before the lords ordinary, and causes, *Darling*, 929–935—Observations thereon, *Mr. Wallace's proposed Report, Proc. in Com. p.* xv. xvi.—Arrears before certain lords ordinary arise from the extent of business being such that they cannot overtake it, *M'Neill*, 1483, 1484—It is caused by the choice of lord ordinary, *Rep.* viii.; *Alexander*, 389–392—Extent of arrears before Lords Moncrieff and

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and Jeffrey in the last session, *Hunter*, 1944, 1945—There are great arrears before some lords ordinary, but which is not to be attributed to them, *Miller*, 2179, 2183—Analysis of new business before the different lords ordinary in the last session, showing in what manner the evil of arrears is curing itself, *Hunter*, 2019–2021—Reference to the evidence of Mr. Fisher, before the Law Commission, on the delay arising from the arrear of cases in the debate rolls before the lords ordinary, *Miller*, 2187—Tabular view of the business before the lords ordinary in the Court of Session during the winter session 1839–1840, *App.* p. 247.

**4. Suggestions for preventing Arrears before Lords Ordinary.**

Improvements suggested would prevent all arrears before the lords ordinary, *Stodart*, 1810, 1811—A distribution of causes would prevent arrears accruing, *Sir William Rae*, 171–177; *Thomson*, 205–210; *Dean of Faculty*, 1298, 1299; *Stodart*, 1766, 1767—Why a distribution of causes would not get rid of arrears before some lords ordinary, *Lord Advocate*, 79; *Robert Bell*, 2431, 2432—They would not take place before the lords ordinary if they were relieved from routine business, and their bars better supplied with counsel, *Miller*, 2223.

See also *Choice of Lord Ordinary*, 2. *Inner House*, 1. 5, 6. *Lords Ordinary*, 3. *Outer House Session*. *Period of Sittings*, 2.

*Auchterarder Case*. Reference to this case as regards the opinions of the consulted judges, *Hunter*, 2108.

*Avisandum*. Objection to the period cases are kept by lords ordinary for, *Stodart*, 1769.

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**B.**

*Bankrupt Act*, [1839.] Digest thereof published by witness, *Alexander*, 376.

*Bankruptcy*. The Bill Chamber is always open without vacation for proceedings in cases of bankruptcy, *Lord Advocate*, 58.

*Bar of Scotland*. See *Counsel*.

*Bell, George Joseph*. (Analysis of his Evidence.)—Advocate of the Scotch bar since 179\*, 2564, 2565—Professor of the law of Scotland in the University of Edinburgh, 2566—One of the principal clerks of session, 2567—Member of the commission in 1824, 2568—Chairman of that in 1833, 2569—The statute of 1825 has not produced all the effect expected from it, 2573—The hearing and decision of causes in the outer house has given great satisfaction, 2574–2576—Similar satisfaction has not been experienced with regard to the inner house, 2577–2579—The dissatisfaction expressed in 1833 still continues, and very much from the same causes, 2580–2585—Detail of the causes of dissatisfaction at the hearing in the inner house, 2586, 2587—If cases were opened by counsel in the inner house as fully as they are in the outer house, the present dissatisfaction would entirely disappear, 2588–2590.

The difficulty of understanding the cases as heard in the inner house prevents any attendance of the bar, except in cases of particular importance; evils to the bar from the want of such a school; 2591–2595—It is very essential for the administration of justice in Scotland and its due character, that full *viva voce* discussion should be introduced, 2596–2601—The lord ordinary's note was substituted for a *viva voce* opinion shortly after the statute of 1825, 2602–2604—The *viva voce* opinion of the lord ordinary would be much better, 2605—It was enjoined by the original commission that the appeal to the inner house should be by note of facts, and that nothing should be said in the way of argument, 2606—Opinion of eminent witnesses before the commission in 1834, that the judges of the inner houses should have nothing to read before they hear the cause, 2608–2610—In the ordinary class of cases the grounds of judgment, in the inner house, are not sufficiently stated, 2611, 2612—It was and still is much wished that the judgments should not be delivered till the next day, 2613

Description of minutes of debate, or cases, which are sometimes ordered, 2614–2617—The sittings in court are no criterion of the time occupied by the judges, whose labour at home is long and arduous, 2618–2620—Further opinion in favour of more public work and less private study, 2621—One inner house would not be sufficient; an improved system would cause more business, 2622, 2623—Reducing the number of judges to three would be highly inexpedient; it would be better to augment it to five, by a lord ordinary attending the inner house in rotation, 2624, 2625—Incidental proceedings in the inner house had better be sent to the outer house, 2626–2628—Defect in the preparation of causes partly attributed to the strictness of the Judicature Act, in not allowing the court to make acts of sederunt for the guidance of its practice, 2629–2633—The sittings in court were longer, prior to 1825, than since, 2634–2637—Further opinion in favour of judges reading the papers, after hearing the arguments, instead of previously, 2638–2649.

Manner in which the Judicature Act has been too strict with regard to pleading; difference between jury cases and those partaking of a Chancery character; 2650–2654—The judges sometimes differ in the conclusions they form from the statements of facts made on one side or the other, 2655–2660—The business of the Court of Session

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comprising the jurisdiction performed in England by the court of Chancery, the common law courts, the ecclesiastical courts, and the court of bankruptcy, the number of inner divisions and lords ordinary cannot be reduced, 2661, 2662—Opinion in favour of a *viva voce* judgment of the lord ordinary, but which might also be reduced to writing, 2663–2675—Preparation of records should be put into the hands of a person to act according to strict rules, and report to the judge, 2679–2683.

Advantages of jury trial; its great expense prevents its being a favourite; it would be dangerous and inexpedient to force it by legislative enactment, 2684–2689—Further opinion in favour of *viva voce* opinion of the lord ordinary, 2690–2694—Special cases have been used but seldom, and only on jury trials, 2695, 2696—Reserving points is not in accordance with the practice of the Scotch courts, 2697, 2698—It would be advantageous if the lord ordinary's decision could be final, subject to certain points reserved for the opinion of the inner house, 2699–2701—In important cases, and where the inner house differs from the lord ordinary, the grounds of the judgment are delivered fully, 2702–2704—Further opinion in favour of judges deciding upon oral pleading, and merely referring to the record, 2705–2715—Inconvenience in point of building of the outer houses, and convenience for the inner houses, 2716–2718—If causes were heard in the inner house as fully as in the outer house, the bar would have a greater number of persons brought forward, 2719, 2720—Further evidence in favour of *viva voce* judgments of the lords ordinary, 2721–2725—Further opinion in favour of lords ordinary sitting in rotation in the inner house, 2726, 2727.

Objection to the frequent revisal of condescendence and answers; it should be imperative to close the record according to the judgment of the person appointed to superintend it; 2728–2730—Imperfections in the Judicature Act; manner in which it prevents regulations by acts of sederunt; suggestions for improvement contained in the first Report of the Law Commission; 2731–2739—Further evidence upon the unpopularity of jury trial, from its expense, 2740–2744—One court would insure uniformity of decision, but which can be done by a united judgment; but one court could not get through the business; 2751–2764—Examination upon the extent of business before different judges, and upon certain of them having also the duties of the Exchequer and Justiciary, 2765–2777—Judges ought to have the power of compelling the closing the record, 2778–2781—Amendment of the Judicature Act must be done by the legislature, 2782–2784.

**Bell, Graham.** Reference to his evidence before the Law Commission as to the want of arrangement of business before the lords ordinary, *Hunter*, 1943—On the delays before the lords ordinary, and in what manner they might be prevented, *Miller*, 2184.

**Bell, Robert.** (Analysis of his Evidence.) An advocate of the Scotch bar, 2419—Prosecutor to the Church of Scotland, 2420—In practice nearly 36 years, 2421—Has been engaged in several of the most important causes that have been heard before the Court of Session, 2422—The present number of judges not more than sufficient; the business is fully sufficient to occupy their attention, 2423, 2424—Advantage of the choice of lord ordinary, 2425–2428—Distribution of causes would be inexpedient, 2429–2432—Since the Judicature Act, *viva voce* pleading has been more adopted before the lords ordinary, which has given great satisfaction, 2433, 2434—Not expedient to dispense with either division as a court of review, and substitute one court in their place, 2435—No alteration recommended in the present number of judges, 2436.

The Judicature Act has not been so fully carried out in the inner house as it has in the outer house, as regards parole pleading, 2437–2443—Description of impatience at the arguments of counsel manifested by judges, when they have made up their minds from reading the record, 2444–2447—The evil is working its own remedy, as the spirit of the Act is carried out, more business will be done in public, which will be more satisfactory, 2448–2450—The return of the number of hours of the sittings of the inner house is no criterion of the business before the judges, or of the work they have to perform, 2451, 2452—The profession and the public are satisfied with the mode of administering justice before the lords ordinary since 1825, 2453–2455—Want of satisfaction in the profession is pretty general at the mode of conducting business in the inner house, 2457–2460.

The junior members of the bar are not sufficiently encouraged by the court in their arguments in the inner house, 2461–2465—The judges of the inner house should not see the record or lord ordinary's note till counsel begin to address them, 2467—Which, with postponing the giving judgment to a subsequent day, would give greater satisfaction at decisions, 2467–2469—Cases in which the judges of the inner house have recently adopted the practice of writing their judgments, 2470–2476—Grounds of judgments are, in many cases, not stated sufficiently fully, 2477–2479—From the want of which, and full *viva voce* argument, the public have no security but their confidence in the judge, that their case has been fully considered, 2480—From the short manner in which arguments are conducted, the public, nor even professional men, who are not in the cause, cannot, in many cases, understand the point the court has to decide, 2481–2485—Proportion of cases so circumstanced, 2503–2509—Which causes a very small attendance of the bar, 2486

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2486-2488—Unless when cases of great importance are being fully gone into, 2489, 2490.

Disadvantage to the bar, particularly to the junior members, from their not being able to receive that instruction which is necessary by an attendance on court, 2491-2496—Barristers who report cases obtain the record, and are by that means in a similar situation to the court itself, 2497-2501—Young barristers might, as a matter of favour, be able to obtain copies of cases, 2502—Number of judges in the inner house who have been lords ordinary, 2510—No reflection cast on the judges; it is most natural that the older ones should continue the habits of 30 years as regards studying the cases at home; 2506, 2511, 2512.

(Second Examination.) To what the defects of the system and the dissatisfaction of the public are to be attributed, 2513—Reference to the evidence of the Attorney-General, Sir John Campbell, before the Law Commission, as to the inconveniences arising from the lords ordinary not sitting in the inner house, and to what extent the witness coincides therein, 2514-2521.

Opinion against a renewal of the act of sederunt of 1604, for the division of the bar, 2522-2526—Further evidence upon acts of sederunt, as to putting out the roll, postponing causes from the absence of counsel, &c., 2527-2536—Routine business being removed from the inner house would not save 15 minutes a day, 2537, 2538—Opinion that chamber sittings would be advantageous, 2539—Inconvenience that would arise to counsel from one of the divisions sitting for some hours after the other had risen, 2540-2549—Also, from the alternate sittings of the lords ordinary, 2550-2552—Opinion against distribution of causes, and in favour of choice of lord ordinary, 2553, 2554—Objections, as regards the profession, to the two divisions sitting on alternate days, 2555-2558—Further evidence in favour of a short interval between argument and judgment, 2559-2563.

**Bill Chamber** [Court of Session]. The business of, was formerly done by the puisne judges in rotation, *Lord Advocate*, 7—Nature of the Bill Chamber, *Lord Advocate*, 58—Motion by agents therein has not been found inconvenient, and which practice shows they would not be incompetent to make motions in the motion-rolls of the lord ordinary, *Alexander*, 452, 469.

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**Boroughs.** Questions under the Act reforming the constitution of boroughs may have increased in the Court of Session, but not to any extent, *Thomson*, 270.

**Buildings of the Court of Session.** See *Session, Court of*, 2.

## C.

**Campbell, Sir John Islay.** Bill brought into Parliament by him in 1785, when Lord Advocate, to reduce the number of Judges, the blanks in which Bill were intended to have been filled up with "Ten," *Darling*, 1177-1179.

Copy Bill for augmenting the salaries and lessening the number of the Judges in the Courts of Session and Exchequer in that part of Great Britain called Scotland, *App. p.* 249.

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**Campbell, Simon.** Reference to his evidence before the Law Commission, recommending the lords ordinary and the inner house to sit on alternate days, *Miller*, 2407.

**Capital Punishment.** The abolition of capital punishment may facilitate prisoners pleading guilty, *Lord Advocate*, 70.

"Cases." See *Written or Printed Arguments or "Cases."*

**Causes.** Extract from returns, showing the number of causes before the Court of Session, and how far it shows an increase or diminution of business, *Sir William Rae*, 148—Statement showing the rapid decrease of business of the Court of Session since 1794, *App. p.* 241—Return of the number of causes instituted and decided in the Court of Session, between 1 January 1839 and 1 January 1840, *App. p.* 242—Tabular view of the business before the lords ordinary in the Court of Session, during the winter session, 1839, 1840, *App. p.* 247—Return of the number of causes decided by the Tiend Court, 1830, 1840, *App. p.* 248.

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**Cessio Bonorum.** The process has been removed almost entirely to the Sheriff's Court, *Waddell*, 654; *Darling*, 906; *M'Neill*, 1640; *Stodart*, 1672.

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**Chambers Business in England.** The bail court or chamber business in England is not analogous to the Court of Session, *Dean of Faculty*, 1294.

**Chamber Sittings in Scotland.** Opinion that chamber sittings would be advantageous, *R. Bell*, 2539.

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*Chancery*, Court of, in England. If their pleadings were printed, and a certain degree of knowledge were acquired by the judge before the case was opened by counsel in court, it would do more than any thing else in the diminishing of arrears and expediting the business, *Dean of Faculty*, 1280.

See also *Acts of Sederunt*.

*Chancery Proceedings*. See *Record*.

*Choice of the Division of the Inner House*. Whether the arrangement giving suitors an absolute choice of the division, has not been attended with prejudicial effects, *Lord Advocate*, 79—Doubts whether parties should choose their own division, *Sir William Rae*, 153—Objection to the right of choice of the division, *Dean of Faculty*, 1300-1303; *Alexander*, 371—Observations on the choice of the division, *Rep. iii.*; *Mr. Wallace's proposed Report, Proc. in Com. p. xvii.*

#### CHOICE OF LORD ORDINARY:

1. *Advantages thereof, and opinions against giving it up.*
2. *Evils thereof, and proposed remedies.*

##### 1. *Advantages thereof, and opinions against giving it up.*

Advantage to the bar, the profession and the public, of the choice of Lord Ordinary, *Rep. iii.*; *Dean of Faculty*, 1297. 1361, 1362; *Sir William Rae*, 153; *Alexander*, 371—Before it was allowed, it could always be done by a little management, *Alexander*, 372, 373—It does not take place from caprice, but from the wish of going to the best judge, *Hunter*, 1946-1948; *Miller*, 2262-2266.

Opinion against giving up the choice of lord ordinary, *Alexander*, 372, 373; *Dean of Faculty*, 1297; *Hunter*, 2018; *M'Neill*, 1572; *R. Bell*, 2425-2428. 2553, 2554—Giving up the choice would be very unpopular, *Thomson*, 205-210—It would be too violent a change, *Stodart*, 1821—It would be short-sighted and unwise, *Solicitor-General of Scotland*, 2817.

##### 2. *Evils thereof, and proposed remedies.*

Whether the choice of lord ordinary has not been attended with prejudicial effects, *Lord Advocate*, 79—Delay caused by the disproportion of cases before some lords ordinary, *Stodart*, 1769—How far the choice of judges causes the evil of arrears before certain judges to remedy itself, *Darling*, 936-940—A forced distribution of causes among the lords ordinary would do away with the privilege of choice, which is highly valued by the suitors, *Sir William Rae*, 171-177—Proposed method of regulating choice to prevent too great arrears before certain lords ordinary, *Stodart*, 1772—To what extent the plan of regulating the choice of lords ordinary should be compulsory, *Stodart*, 1819-1821—Observations thereon, *Mr. Wallace's proposed Report, Proc. in Com. p. xvii.*

*Circuits*. Number of circuits appointed in Scotland in each of which two justiciary judges officiate, *Rep. iv.*; *Lord Advocate*, 58; *Solicitor-General for Scotland*, 2868-2874—They are for criminal business, and very few counsel attend for civil cases unless specially retained, *Waddell*, 823-826; *Dean of Faculty*, 1381; *Solicitor-General for Scotland*, 2868-2874—In cases of difficulty the judges on circuit certify the case to the high Court of Justiciary, *Lord Advocate*, 72—Judges are longer on the circuits than they used to be, *Solicitor-General of Scotland*, 2897-2900.

*Civil Causes*. The jurisdiction of the Court of Session extends to all civil cases of every description, *Lord Advocate*, 6.

See also *Circuits*. *Jury Trial*. *Local Courts*. *Session, Court of*, 1. *Sheriff Courts*, 1. *Trials*.

*Clerks of the Court*. It has been proposed that they should act as judges in common matters of routine, *Alexander*, 443—Description of routine business that might be performed by the clerks, *Stodart*, 1713-1718; *Solicitor-General of Scotland*, 2834-2836—Objection by the Law Commission that the clerks of court have not the requisite authority to dispose of routine business, which would cause wrangling and an appeal to the lord ordinary, agreed to, *Miller*, 2228.

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*Commissary Court*. Part of the duties of, have merged in the Court of Session, *Waddell*, 639.

*Commissions*. See *Proofs upon Commission*. *Witnesses*.

*Compromises*. The dissatisfaction arising from the diversity of judgments of the two divisions has led to an increased number of compromises, *Stodart*, 1673.

*Condemnations in rem*. Considerable arguments sometimes arise before the Court of Session in cases of penalties in condemnations in rem, *Lord Advocate*, 61.

*Condescendence*.

**Condescendence.** Nature of, in the Court of Session, for the purpose of stating matters of fact, *Lord Advocate*, 16—Particulars relative to condescendence and answer and revision, till the parties satisfied as to the statement of facts, under Act 6 Geo. 4, c. 120, *Lord Advocate*, 18, 19; *Sir William Rae*, 143; *G. J. Bell*, 2728–2730—Part of the statute relating to, has led to a multiplication of proceedings, and great expense not anticipated, *Sir William Rae*, 154—Parties should be restricted to two revisals of condescendence and answers, unless on special cause shown, *Alexander*, 397, 398—The right of a defender to require a condescendence ought to be left to the opinion of the judge or person preparing the record, *G. J. Bell*, 2676–2678.

See also *Preparation of Causes*. *Record*.

**Confirmations.** Act of sederunt explaining Act of Parliament 4 Geo. 4, c. 98, without authority in the Act so to do, *Darling*, 1918–1927.

**Consistorial Courts.** Were abolished by Act 11 Geo. 4, and 1 Will. 4, c. 69, and all the consistorial judicature vested in the Court of Session, *Rep.* iv.; *Lord Advocate*, 6; *Sir William Rae*, 143; *Waddell*, 639—In consistorial cases it is usual to take evidence in court or on commission, *Thomson*, 333, 334.

**Consultations of Judges.** See *Hearings in Presence*.

**Conveyancing.** Conveyancing questions, which constantly arose out of feudal questions, have been removed from the court, *Darling*, 904.

**Corehouse, Lord.** His absence from court through illness was regretted by the profession, *Miller*, 2159–2162.

#### COUNSEL:

1. *Extent, Talent and Precedence of the Scotch Bar.*
2. *Evils to the Bar for want of a sufficient hearing in the Inner House.*
3. *Opinions for and against a distribution of the Bar between the Courts.*
4. *Evils arising from the absence of Counsel in other Courts.*
5. *Effect that abolishing one Chamber would have on the Bar.*

##### 1. *Extent, Talent and Precedence of the Scotch Bar.*

The bar and the profession were on the increase, but have had a check, *Miller*, 2345–2349—Great importance of a proper selection of counsel in the first instance; a great demand for well-employed counsel would insure its own supply, *Miller*, 2192–2196—There are not men of sufficient talent and intellect at the bar of Scotland to keep up a bench of 13 judges, *Darling*, 1192–1201—Manner in which alteration of the practice in 1825 has caused a monopoly of the talents of the bar, *Miller*, 2224, 2225—The only monopoly of the Scotch bar is that of talent, *Miller*, 2377–2381.

The only silk gowns at the Scotch bar are the Lord Advocate and Solicitor-General, *Dean of Faculty*, 1408; *M'Neill*, 1523; *Mr. Wallace's proposed Report, Proc. in Com. p. xvi.*—With the exception of those officers and the Dean of Faculty, there is no distinction of rank beyond the number of years standing at the bar, *Dean of Faculty*, 1408; *M'Neill*, 1523—The junior counsel only make motions, *Waddell*, 661—Examination upon senior and junior counsel, and the number of counsel allowed to speak in one cause, *M'Neill*, 1521–1530—Meaning of the term “leading counsel,” *Hunter*, 1986, 1987—Number of leading counsel, *Stodart*, 1781, 1782; *Miller*, 2221–2223; *Hunter*, 2048–2053; *Mr. Wallace's proposed Report, Proc. in Com. p. xvi.*—Number of well-employed counsel, *Stodart*, 1783; *Miller*, 2220; *Hunter*, 2048–2053; *Mr. Wallace's proposed Report, Proc. in Com. p. xvi.*—Precedence of counsel in the inner house on reviewing judgments in the outer house, *Alexander*, 404—Rule and practice with regard to opening cases by the senior or junior counsel, *Dean of Faculty*, 1277—Difference in counsel with regard to their mode of arguing, and the manner in which they take the interruption of the judges, *Dean of Faculty*, 1277.

##### 2. *Evils to the Bar from the want of a sufficient hearing in the Inner House.*

The junior members of the bar are not sufficiently encouraged by the court in their arguments in the inner house, *Miller*, 2297, 2298; *R. Bell*, 2461–2465—The not being able to obtain legal information at the hearing of cases, causes a very small attendance of the bar, *R. Bell*, 2486–2488—When cases of very great importance are being fully gone into, there is a large attendance of the bar, *R. Bell*, 2489, 2490—Young barristers might, as a matter of favour, be able to obtain copies of cases, *R. Bell*, 2502—The difficulty of understanding the cases as heard in the inner house, prevents any attendance of the bar, except in cases of particular importance; evils to the bar from the want of such a school, *Rep.* ix.; *R. Bell*, 2491–2496; *G. J. Bell*, 2591–2595; *Solicitor-General of Scotland*, 2803—If causes were heard as fully in the inner house as they are in the outer house, the bar would have a greater number of persons brought forward, *G. J. Bell*, 2719, 2720.

##### 3. *Opinions for and against a distribution of the Bar between the Courts.*

On the division of the courts, it was proposed that the bar should be divided, but it was not considered advisable eventually, *Thomson*, 222. 233—Considerable advantage would be derived if they would divide themselves into counsel for the inner and counsel for the

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outer houses, *Darling*, 1006—It would be agreeable to the bench, the agents and the suitors, *Darling*, 1018–1020—The senior counsel attaching themselves to the court of review, would be beneficial to the junior members of the bar, *Darling*, 1019; *Stodart*, 1771.

Their being divided into classes for attending particular courts would be a convenience to the public, but it is a question whether it would not infringe the rights of the profession, *Alexander*, 515–517; *Waddell*, 606–609—It would not be worth the while of men of eminence to practise if they were so circumscribed, *Waddell*, 749–753—A division of the bar would be impracticable; the evils the public suffer will work their own cure, *Dean of Faculty*, 1335—Objections to a division of the bar, *M'Neill*, 1508–1513; *Dean of Faculty*, 1398–1410—It is not practicable, by legislative means, to confine counsel to particular courts, *Miller*, 2198.

Act of sederunt of 11 January 1604, for classifying counsel between the two houses, *Stodart*, 1776–1780—Opinion that such an act of sederunt now would be beneficial, would not be objected to by the society of writers to the signet, and would not be unfavourable to the bar, *Stodart*, 1784–1794; *Mr. Wallace's proposed Report, Proc. in Com. p. xvii.*—Opinion against a renewal of the act of sederunt of 1604 for the division of the bar, *R. Bell*, 2522–2526.

*4. Evils arising from the absence of Counsel in other Courts.*

Delay and expense arising from the number of courts sitting at the same time, and counsel being wanted before several, and the inner house taking the preference, *Thomson*, 218–234; *Alexander*, 444–448. 482–486; *Waddell*, 591, 592. 596–605. 765, 766. 865–874; *Darling*, 998–1005. 1007–1010; *Dean of Faculty*, 1398–1410; *M'Neill*, 1504–1509. 1514–1520; *Stodart*, 1769; *Hunter*, 1984, 1985; *Miller*, 2183–2191. 2216–2219; *Mr. Wallace's proposed Report, Proc. in Com. p. xvi.*—It is an evil that will cure itself, *Dean of Faculty*, 1398–1410; *M'Neill*, 1504–1509—Reference to Mr. Fisher's evidence before the Law Commission on the delay arising from the absence of counsel before both houses, *Miller*, 2187.

Delays in the hearing of causes before Lords Moncrieff and Jeffrey arising from the absence of counsel, *Miller*, 2216–2219—Objection to the Dean of Faculty's statement, that there were no complaints formerly as to the absence of counsel, and that the judges should accommodate themselves to the necessity of the case, *Miller*, 2224—The same difficulty does not arise from counsel being in either division of the inner house as between the inner house and the outer house, *Miller*, 2226, 2227—Fewer tribunals sitting, and those not to admit of counsel leaving the bar during a debate might prevent the inconvenience arising from the absence of counsel, the decrease of business in the outer house being made up by the increase of business in the inner house, and by the increase of fees, *Hunter*, 1989; *Miller*, 2357–2363.

*5. Effect that abolishing one Chamber would have on the Bar.*

There being only one chamber, would not cause much difference with regard to absent counsel, *Waddell*, 695, 696—The delay occasioned by counsel being in different courts would be partly obviated by having only one division, *Stodart*, 1708–1710—Advantages that would result from the facility of obtaining senior counsel if there were but one chamber instead of two, *Stodart*, 1756, 1757—If the inner houses were consolidated, the evils from their absence would no longer exist, *Miller*, 2415, 2416—Manner in which the abolition of one chamber would affect the bar, as regards promotion and increase of business, *Stodart*, 1846. 1850—Reduction of the court would be more advantageous than confining counsel to one court, *Miller*, 2197–2201.

See also *Acts of Sederunt. Circuits. Fees to Counsel. Parole Argument. Removal of Counsel, &c. Sitzings*, 1.3. *Trials.*

*Criminal Business.* The criminal business of Scotland is increasing, from the increase of crime necessarily incident to the increase of population, and from the improved system of police, *Lord Advocate*, 67—Increase in the criminal business, and causes thereof, shown by the cases tried before the Court of Justiciary and on the circuit, 1829–1838; *Rep.* iv.; *Lord Advocate*, 67, 68—Extract from return of the number of trials by the Court of Justiciary in 1810, 1829 and 1838, and number of days the court sat in Edinburgh and on circuit, *Lord Advocate*, 68—Increase in the business before the High Court of Justiciary, particularly as regards the higher descriptions of crime, *Sir William Rae*, 159, 160—Examination of criminal trials before the Justiciary and Circuit Courts; increase therein; extent to which more business has been transferred to the sheriffs' juries, *Solicitor-General of Scotland*, 2887–2894—Power of appeal from inferior criminal jurisdictions to the Court of Justiciary, *Lord Advocate*, 70, 71—Juries generally give satisfaction in criminal cases, *Waddell*, 705, 706. 709; *M'Neill*, 1615, 1616. 1619.

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## D.

*Darling, James Johnston.* (Analysis of his Evidence.) Writer to the signet since 1824, 896, 897—Publisher of a work on the practice of the Court of Session, and another on directions to officers of the law for executing their duties, civil and criminal, 899. 901—Decrease of the business in the Court of Session of late years, and causes thereof, 902–916—Short sittings of the court; the Queen in Council has the power of extending them, but that power has not been exercised, 917–928—Extent of arrears before the lords ordinary and the inner house, and causes, 929–935—How far the choice of judges causes the evil of arrears before certain judges to remedy itself, 936–940—Extent of sittings of the lords ordinary, and how far called away to other courts, 946–949—Relieving the judges from the preparation of records and motions of course would cause a great saving of time, 954. 960, 961—Opinions expressed by the Law Commission are well founded, and their adoption in practice would be useful, 955–958. 962–966—Powers of the court with regard to acts of sederunt, and to what extent an Act of Parliament would be required to carry the recommendations of the Law Commission into effect, 967–971.

(Second Examination.)—Recommendations of the Law Commission have not all been carried into effect; periods their reports have been published, 972, 973—Lords ordinary should be relieved from the preparation of records and calling the hand roll, 974, 975. 980–988—Suitors are more satisfied with proceedings in the outer house than the inner house, though the number of judgments brought under review of the inner house is increasing, 977–979—Examination upon Parliamentary returns, 1819–1823 and 1835–1839, showing the number of cases brought under review of the inner house, and number of final judgments by the lords ordinary, 989–997—Complaints of suitors in the outer house of the manner in which debates are interrupted by counsel being called away, 998–1005—The inner house, by act of sederunt, will not submit to postponement on account of the absence of counsel, 1007–1010—Roll of causes for the day regulated by the presidents of the divisions, 1012, 1013—Judges can change the hour of meeting by act of sederunt; a change would not be advantageous, 1015–1017.

A division of counsel would be agreeable to the bench, the agents and suitors, 1018–1020—Jury clerks peremptorily insist on the attendance of counsel and agents at the preparation of issues; inconvenient hour at which they meet, and which might be altered by the direction of the president of the court, 1021–1028—Expense and delay under the present mode of framing issues, 1029, 1030—Number of questions that have arisen since 1825 on points of form; supposed expense of each, total amount, and evils of its falling on suitors, 1034–1042—In what manner the court might alter and have altered the common law and Acts of Parliament by means of acts of sederunt, 1043–1087. 1095–1108—The whole body of acts of sederunt has never been revised and consolidated, 1088–1090—Proposed mode of diminishing the expense of suitors before the court, 1091–1094—Objections to the expense of printing proceedings in the first instance, which are only wanted in the event of going before the inner house, 1109–1127—Jury trials are expensive, and are one cause of the decrease of business in the Court of Session, 1128, 1129.

Expense of taking proofs by commission was not all paid at one time, as in jury cases, but the proceeding was more dilatory, and the time of the court more occupied, 1131–1139—If the preparation of records was removed from the lord ordinary, that business might proceed in vacation, 1142–1150—Lengthening the sittings of the court would give greater despatch to business, and diminish existing arrears, 1152–1154—Extent of business at present before the first and second divisions, 1155–1158—Table showing the arrears of business in the Court of Session on the 1st January 1832–1840, made up from the annual returns to Parliament, 1161—Period for which the Crown has the power of extending the sittings, which has not been exercised for the inner houses, and only once for the outer houses, 1163–1166—Extending the March and November sittings has a tendency to diminish the arrears in the outer house, but to increase those of the inner houses, 1167–1171—Alterations suggested in the practice of the court, by which four judges might be dispensed with; that is to say, one of the inner houses, 1172–1191.

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**Darling, James Johnston.** (Analysis of his Evidence.)—continued.

papers, arises from the curtailed pleadings under the Judicature Act, and its not permitting sufficient time for oral pleading, 1252, 1253.

(Third Examination.)—Further instance in which the court, by act of sederunt, have explained an Act of Parliament, without a power given them by that Act so to do, 1918–1927—The Judicature Act has not diminished the appeals to the House of Lords, 1928—Period of obtaining answer when one division consults the other, 1929—Sittings in the Justiciary Court are arranged by the judges privately, 1930, 1931.

**Darling, Mr.** Motion for expunging so much of his evidence as relates to a Bill, Ayes 7, Noes 1, *Proc. in Com.* p. xi.

**Dean of Faculty.** Reference to a letter from him, explanatory of his evidence before the Law Commission, relative to the impatience of the judges with regard to *vivâ voce* evidence, *Sir William Rae*, 145—Extract from his evidence before the Law Commission, relative to the mode of procedure in the inner house, the dissatisfaction thereat, and the remedies suggested, *Waddell*, 839–841—Reference to his evidence in the Report of the Committee on Judges' Salaries, as to the laborious duties of the lords ordinary, *Hunter*, 1991—Reference to his statement before the Law Commission, that there were no complaints as to the absence of counsel formerly, and that the system has continued since 1808, and that the judges should accommodate themselves to the necessity of the case, *Miller*, 2224—His opinion before the Commission in 1834, that the judges of the inner house should have nothing to read before hearing the cause, *G. J. Bell*, 2608.

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**Debts, Small.** See *Small Debts*.

**Decrease of Business.** See *Inner House*, 1. 4. *Judges of the Inner House*, 1. *Jury Trials*. *Law Commission*. *Litigation*. *Points of Form*. *Session, Court of*, 4. *Sheriff Courts*, 1.

**Decrees in Absence.** Opinion in favour of their being moved by agents instead of counsel before the lord ordinary, *Alexander*, 449. 457–461—Increase in the number of 1839 over 1831, *Stodart*, 1668, 1669—Method of proceeding in getting a party reponed against under a decree in absence, and in what manner the inner house might be relieved from the mere form, but which could not be done by an act of sederunt, *Stodart*, 1751–1755.

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**Deeds of Entail.** To what extent it is necessary that judges should read deeds of entail, *Hunter*, 2000–2002.

**Defences.** Defences in the Court of Session were formerly more meagre than they are now, *Lord Advocate*, 17—Nature of them as defined by Act 6 Geo. 4, c. 120, *Sir William Rae*, 143—Objection to there being arguments stating the case in a rhetorical way, instead of being pleadings in the cause for the purpose of making an impression upon the judges of the inner house, and also an impression upon the friends of the parties, *G. J. Bell*, 2587.

**Delay and Expense.** See *Accountants*. *Lords Ordinary*, 3, 4. *Preparation of Causes*, 1. *Proofs upon Commission*. *Session, Court of*, 3. 5.

**Diligence Process.** The Bill Chamber is always open without vacation, for the purposes of stay of diligence process, *Lord Advocate*, 58.

**Distribution of Causes.** See *Choice of Lord Ordinary*, 2. *Lords Ordinary*.

**Divorce Cases.** The taking of proofs upon commission is devolved upon six sheriffs appointed for the purpose, *Waddell*, 639—The necessity for the judge reading the papers in such cases, would depend upon circumstances, *Stodart*, 1859.

## E.

**Edictal Citations.** Manner in which the Court of Session by act of sederunt have supplied an omission in the Act of 1 & 2 Vict., c. 118, relative to, *Darling*, 1072–1082; 1098–1108.

**Election Petitions.** Difficult and important questions which arose out of election petitions, have been removed from the Court of Session since the Reform Act, *Stodart*, 1672.

**English Judges.** The Scotch judges even now possess a greater power of making rules for the regulation of their courts than the English judges, *Alexander*, 570, 571—It is generally considered that they are more patient and more cautious of giving an opinion than the Scotch judges, *Stodart*, 1888.

**English Law.** Scotch judges are required to be cognizant with the course of decisions in the English courts of justice, as well as those of Scotch courts, *Miller*, 2351, 2352.

**Entailed Estates.** Manner in which the inner house should be relieved from applications under Acts of Parliament for the sale of, &c., *Hunter*, 1954.

**Evidence.** In some cases taking proof upon commission, or proof by witnesses taken in court, might avoid expense and be of great advantage, *Thomson*, 332.

**Ewart, William, Esq. M.P.** Motion that the Report submitted by Mr. Wallace be entered in the Proceedings of the Committee, agreed to, *Proc. in Com.* p. xiii.

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**Exchequer Business.** Nature of the Exchequer business discharged by the Court of Session in Scotland, *Rep.* iv.; *Lord Advocate*, 58–62; *Waddell*, 639, 640—Number of judges who sit for; they sit by rotation, *G. J. Bell*, 2765, 2766—Observations as to the most popular judges having also this duty to perform, *Mr. Wallace's proposed Report, Proc. in Com. p.* xxiii.—A Bill for augmenting the Salaries and lessening the number of the Judges in the Courts of Session and Exchequer in that part of Great Britain called Scotland, *App. p.* 249.

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**Exclusive Jurisdiction.** The Court of Session has exclusive jurisdiction in the more important civil cases, particularly those touching real property and consistorial and admiralty cases, *Lord Advocate*, 6.

**Executors.** Part of the form of the confirmation of, is transferred to the sheriff of Edinburgh, *Waddell*, 639.

**Executors Creditors.** Act of sederunt explaining Act of Parliament, 4 Geo. 4, c. 98, without authority in the Act so to do relative to confirmations of executors creditors, *Darling*, 1918–1927.

**Ex Nobili Officio.** Evil of the want of uniformity of practice as to points requiring the intervention of the court ex nobili officio, *Hunter*, 1988.

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## F.

**Factors.** The inner house possess original jurisdiction in appointments of factors, *Waddell*, 625.

**Facts.** Arrangements that there should be no appeal to the House of Lords where the Court of Session was required to make findings in fact, *Lord Advocate*, 11—Advantage of the Act 6 Geo. 4, c. 120, in compelling parties to state distinctly and separately from the argument the facts on which they relied, and the pleas of law applicable to those facts, *Lord Advocate*, 18, 19—Necessity for obtaining admissions of fact, *Solicitor-General of Scotland*, 2833—Mode by which matters of fact are ascertained, *Lord Advocate*, 87–91.

**Fees to Counsel, &c.** Manner in which certain fees to counsel, attornies, &c. for unnecessary routine business before the inner house, might be saved, *Stodart*, 1720, 1721—Complaints are made by clients of being charged with fees for counsel who do not appear, and practitioners complain of not being enabled to get the services of counsel after having instructed them, *Miller*, 2234, 2235—They frequently receive fees, and are totally unable to give any assistance to their clients, *Miller*, 2382, 2383.

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**Feudal Law.** Number of questions of a feudal nature has diminished in the Court of Session of late years, *Thomson*, 264; *Darling*, 904; *Stodart*, 1672.

**Fisher, Daniel.** Extract from his evidence before the Law Commission relative to the mode of procedure in the inner house, the dissatisfaction thereat, and remedies suggested, *Waddell*, 839, 841—Reference to his opinion given at page 17 of the Appendix to the Second Report of the Law Commissioners of Scotland relative to improvements in the Court of Session, *Darling*, 1182—Reference to his evidence before the Law Commission relative to the delays in the outer house, *Miller*, 2187.

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**Forms of the Court.** Objections thereto, *Waddell*, 590—A committee of the faculty in communication with some of the judges, with a view to simplify, improve and shorten some of the forms, *Dean of Faculty*, 1260.

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**Freehold Qualifications.** There has been a decrease of a considerable number of important cases respecting it since the passing of the Reform Act, *Waddell*, 654; *Darling*, 903; *M'Neill*, 1638, 1639.

**Frivolous Questions.** Costs are given when frivolous questions are raised against the parties raising them, *Darling*, 1043, 1044—The court may not be able entirely to prevent suitors from raising frivolous points, but they may diminish their power of so doing, *Darling*, 1095, 1096.

## G.

**Glasgow Circuit.** There is an additional winter circuit for Glasgow, *Rep.* iv.—When necessary, a commission follows the autumnal circuit to Glasgow to try civil causes; how far it causes additional expense, *Solicitor-General of Scotland*, 2877–2882.

**Glenlee, Lord.** His infirmities when acting as presiding judge in the absence of the Lord Justice Clerk were not such as to cause dissatisfaction, *Dean of Faculty*, 1646.

**Government.** Manner in which the responsibility of Government in the appointment of judges is increased, or rather receives a practical check, by allowing the choice of lords ordinary, *Dean of Faculty*, 1308, 1309, 1362.

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## H.

*Hearing in Presence.* Nature of, *Rep. iii.*—Nature of, as formerly adopted by the Court of Session in cases of great importance, *Lord Advocate*, 14—Nature of the two descriptions of hearings in presence, one of which stops the proceedings of the other courts, and causes inconvenience to the bar and the public, *Thomson*, 244-248; *McNeill*, 1631-1636—They generally take place at hours when the ordinary business of the court should be going on; consequent loss of time to the public and practitioners, *Hunter*, 1988—Great delay arising therefrom, and period that elapses before the judgments of the consulted judges can be obtained, *Stodart*, 1684-1704; *Darling*, 1929; *Hunter*, 2063—The decision must be according to the majority of the consulted judges, *Lord Advocate*, 10—The practice of sending cases for the consideration of the whole court is now frequently resorted to, *Hunter*, 2074-2079—Manner in which they take place at the mere motion of the judges, *Hunter*, 2110-2115—Satisfaction of the profession at the full *vivâ voce* hearing in presence under particular orders, *Stodart*, 1800, 1801—Nature of a hearing in presence, which ought constantly to be adopted, *Solicitor-General of Scotland*, 2828-2832.

*Hope, Right honourable Charles.* Extract from the speech of the Right honourable Charles Hope, Lord President of the Court of Session, on moving the court to pass acts of sederunt, 12 November 1825, *App. p.* 244.

*Hope, John.* Reference to the evidence of Mr. Hope, Dean of Faculty, before the Law Commission, Scotland, as to rapidity of decision in the inner house, *Lord Advocate*, 41—Manner in which certain evidence of his came to be given before the Law Commission in 1833, and was afterwards embodied in their Report; extent to which he wishes to retract it, *Dean of Faculty*, 1277—Motion for expunging a question put to him, *Ayes 5, Noes 1, Proc. in Com. p.* xi.

*Hope, John.* (Analysis of his Evidence.) Dean of the Faculty of Advocates in Edinburgh, 1254—Decrease in the business of the court, but which is not to be attributed to any permanent cause, 1256-1258—The changes of 1825 gave rise to much vexation and expense, but which evil will correct itself, 1259—The Act was too rigid in points of form, but the system was not erroneous, 1260-1263—Within the last five or six years oral argument has been carried to the extent wished for under the Act, 1264, 1265—Subsequent experience has caused witness to consider that his evidence before the Law Commission of 1833 was wrong, and that the judges should have a previous knowledge of the case to a certain extent; instance of waste of time where the judges have been specially requested not to read the papers, 1266-1277—Never meant by his evidence in 1833 to countenance the notion that there was impatience on the part of the judges in hearing statements of counsel; it is not exhibited by the divisions; not aware that a complaint exists at the bar upon the subject; does not think there is; nor is there such an impression amidst the community at large, 1277-1281.

The evil complained of in the evidence before the Law Commission as to the judgments being too shortly given, has in a great degree been corrected, 1282—Since the evidence given before the Law Commission a change has taken place, and the lord ordinary's note does not form the law of the case; the judges state their ground of difference of opinion with the lord ordinary, although they may concur in the result, 1283—One division could not overtake the business; advantages of having the court divided into two divisions, 1284. 1312—Opinion against the reduction of the number of inner house judges to four, and advantages that would be derived from having one of the lords ordinary sitting with them, 1285-1290—Objection to Sir C. Grey's plan of three divisions, so as to approximate the practice to that of the courts at Westminster, 1291-1293—Manner in which the lords ordinary prepare and go through with a case upon their individual responsibility, 1295, 1296—Advantage to the bar, the profession and the public, of the choice of lord ordinary, 1297—A distribution of business before the lords ordinary might reduce the arrears, but it would be more difficult to get through the business, 1298, 1299.

Objections to the right of choice of the division, 1300-1303—The advantage arising from the choice of lord ordinary is greater than the disadvantages arising from the arrears, and which would not be stopped by distributing the business, 1304-1309—Dissatisfaction at the mode of hearing causes in the inner house as compared with the outer house is not to an extent to demand inquiry, and will gradually diminish, 1313-1316—Opinion that the time occupied by sittings in court has decidedly increased since 1833, 1317-1324—Further evidence upon the study of cases by judges out of court and upon *vivâ voce* pleading; how far it is likely to increase, and whether advantageous, 1325-1330—Opinion that the judges of the inner house deliver their judgments as much at length as is desirable, 1331, 1332—Satisfaction at the fullness of the debates before the lord ordinary; evils of their only being conducted at intervals, 1333—As long a discussion is not wanted in the inner house, but great improvement has taken place therein since 1833, 1334—A division of the bar would be impracticable; the evils the public suffer will work their own cure, 1335.

Opinion in favour of seven instead of five lords ordinary, 1336-1341—It would have been more advantageous to have retained 15 judges, and had seven as lords ordinary, 1342—Further evidence upon lords ordinary sitting in the inner house, and upon equality of opinions on decisions, 1343-1349—Objections to the plan of motions being made

*Hope, John.* (Analysis of his Evidence.)—continued.

made by agents, 1350-1354—Also to motions of course being disposed of in the office, and not brought before a judge, 1355-1360—Further evidence as to the advantages in the choice of lord ordinary, 1361, 1362—Opinion against shortening the vacation and lengthening the session, 1363-1367—To what extent there is an arrear of business in the inner house, 1368, 1369—Diminution in the number of printed cases; evils of such diminution; great value of such cases to Scotch litigants, 1370-1375—Great length of lord ordinary's notes, and how far they lead more to reclaiming notes than acquiescence in decisions, 1376-1380.

Sittings of the court for jury trials after the close of the session in Edinburgh, 1381—Opinion in favour of jury trial, and circumstances that have made it unpopular in Scotland, 1382—Further evidence upon the hearing of certain cases in which the judges had been requested not to read the papers, 1383-1395—Reason why causes are tried after the end of the session; they might be tried every Monday if it was wished, or there were enough enrolled, 1396, 1397—Further evidence upon the evil of the absence of counsel working its own cure, and against the division of the bar, 1398-1410—Evidence upon the sittings of the court, and the time occupied by the judges in reading cases at home, at present and formerly, 1411-1416—There are no matters of routine and mere form performed by the judges of the inner houses which might be performed by inferior hands; very short time the routine matters take, 1417-1420. 1431.

Parties have not the power of removing a case from one lord ordinary's roll to another; how far such an application would be likely to be granted if made by both parties in many suits, 1421-1428—Great improvements may be made in the mode of making up the records, but which will not lighten the duties of the lords ordinary, 1429-1430—Objection to an officer to superintend the preparation of records, that business being taken away from the lords ordinary, 1432—Reference to evidence given in 1824 as to the preparation of records, similar opinions being still retained, 1433-1435—Extent to which the superintendence of the preparation of records takes place in court, 1436-1437.

(Second Examination.)—Opinion that there is no business of form or routine that could be conveniently taken from the judges, 1642-1643—Decrease in the business of the court, 1644—Impossible to say whether causes have been of greater importance at one period of time than another, 1645—Inconvenience that would result from reducing the number of judges in the inner division below four, 1646—Satisfactory manner in which the lords ordinary discharge their business, and in which cases are heard before them, 1647—No alteration necessary with a view to improvement of the proceedings of the inner house; the pleadings of counsel may get to greater lengths, but whether that will be advantageous is problematical, 1648-1649.

Extension of the session would not be beneficial, 1650—The daily sittings will be prolonged with increased business, which is expected, 1651—Further reasons for decrease of business, 1652-1653—Increase of business in the Sheriff's Courts from the dislike of trial by jury, and evils thereof, 1654-1658—The court is competent to and does discharge its business in a manner satisfactory to the public, 1659-1662.

*Hour of Meeting.* The hour of meeting of the inner house is fixed by act of sederunt, *Darling*, 1011—Judges can change the hour of meeting by act of sederunt; a change would not be advantageous; *Darling*, 1015-1017.

*House of Lords.* Preference for the course now followed in Scotland to that before the House of Lords, if the papers are also to be carefully read beforehand, *Dean of Faculty*, 1280—Opinion that their decisions cannot be reversed in after years, *Stodart*, 1878. 1881, 1882—Scotch suitors consider there is more uniformity of decision in the House of Lords than in the Court of Session, *Stodart*, 1887—Causes of the great confidence in the judgments of the House of Lords, *Miller*, 2257-2260.

See also *Appeals to the House of Lords. Judgments.*

*Hunter, John, Junior.* (Analysis of his Evidence.) Writer to the signet; of the house of Lockhart, Hunter & Whitehead; well acquainted with the practice before the supreme courts of law in Scotland since 1824, 1932-1936—Diminution in the business of the Court of Session, and causes, 1937, 1938—Want of confidence on the part of the public at the mode of conducting and disposing of cases in the Court of Session, 1938-1940—Cause of delay in the outer house, 1941, 1942—Nature of the want of arrangement in the outer house, and reference to evidence before the Law Commission thereon, 1943—Extent of arrears before Lords Moncrieff and Jeffrey in the last session, 1944, 1945—Choice of lord ordinary does not take place from caprice, but from the wish of going to the best judge, 1946-1948—Cause of dissatisfaction at the mode of conducting business in the inner house, 1949-1952—Nature of routine business of which they should be divested; time it takes, 1953-1982.

Two co-ordinate courts of equal jurisdiction cause great uncertainty, both as to law and practice, 1983, 1984. 1988—Advantages of there being but one chamber; it could get through all the business that ought to come before it, 1988-1990—Hours to which the sittings of the inner house should be extended, 1991-1994—Extent to which the previous reading of the judges might with advantage be done away with, except where there are written cases, 1995-2013—Further evidence as to the description

*Hunter, John, Junior.* (Analysis of his Evidence)—continued.

tion of routine business which could be more advantageously and less expensively done by the outer house than the inner house, 2014–2017—Opinion against giving up the choice of lord ordinary, 2018—Analysis of new business before the different lords ordinary in the last session, showing in what manner the evil of arrears is curing itself, 2019–2021—Nature of arrangements that might be made to prevent the inner house getting into arrear if there were but one division, 2022–2025.

Opinion that the judges of the inner house might put out more cases per day than they do, 2025–2028—One or two more causes than those expected to be got through should be put out, but not to an indefinite number, 2029–2032—Extra number of hours per day the judges should sit, in order to get through their business and hear counsel satisfactorily, 2033–2039—Comparison with the sittings of the lords ordinary, who have more to do, 2040–2047—Number of leading and also of well-employed counsel at the Scotch bar, 2048–2053—Opinion in favour of the preparation of causes by one lord ordinary; an additional one, if necessary, until that work can be satisfactorily done by the parties and their counsel, 2054–2058—If the junior lord ordinary was called in to decide, in the event of an equality, it would give greater satisfaction than calling in the other division, 2059–2063.

Opinion in favour of certain incidental applications being made in vacation, 2065—Increase of business would take place if the improvements suggested were carried into effect, but not to the extent of preventing one court doing the business, 2066, 2067—More judgments from the inferior courts would be appealed against if it could be done with less delay and expense, 2067–2071—Cases are not brought from the sheriff substitute without going before the sheriff depute, 2072, 2073—The practice of sending cases for the consideration of the whole court is now frequently resorted to; minutes of a meeting of writers to the signet to protest against the reduction of the number of judges on that subject, 2074–2079.

Saving of time that would be effected by relieving the lords ordinary from the preparation of causes, and all motions connected with it, 2080—Solicitors and writers to the signet must necessarily be better acquainted with matters of form and complaints by the public than advocates can be, 2081–2085—Experience teaches that two co-ordinate courts have not tended to produce uniformity of decision, 2086–2107—Manner in which hearings in presence take place at the mere motion of the judges, 2110–2115—If the opinion of the whole of the judges could be taken upon abstract points of law, it would be advantageous, 2116, 2117—Nature of the delay and confusion which occurs in hearing cases in the outer houses, 2118–2123.

## I.

*Increase of Business.* See *Lords Ordinary*, 2. *Session, Court of*, 5.

*Inferior Jurisdictions.* Merging them in the Court of Session has been advantageous to the public, both as regards expense and weight of decision, *Thomson*, 326—Decrease of business in the inferior courts has caused a decrease in that of the Court of Session, *Darling*, 914.

*Inhibition and Arrestment.* Manner in which the inner house should be relieved from petitions for recall of the diligence of inhibition and arrestment, *Hunter*, 1954—Question has arisen under the Act to amend the law of Scotland in matters relating to personal diligence, arrestments and poindings, whether in serving an inhibition one witness is sufficient, *Darling*, 1047.

*Injunction.* The Bill Chamber is always open without vacation for the purposes of, *Rep.* iii.; *Lord Advocate*, 58.

## INNER HOUSE:

1. *Business of the Inner House.*
2. *Its Jurisdiction as a Court of Review.*
3. *Dissatisfaction at the mode of disposing of Causes therein.*
4. *How far the Judgments of the two Divisions are uniform.*
5. *Opinions in favour of doing away with one of the Divisions.*
6. *Objections to that proposal.*

1. *Business of the Inner House.*

Cases which come in the first instance before the inner house are not so extensive as formerly, and the preparation of those cases is generally carried on before the lords ordinary, *Lord Advocate*, 57—In what cases they have original jurisdiction, being mere matters of form, *Waddell*, 625—Opinion that the two divisions might do more duty than they do, *Rep.* vii.; *Sir William Rae*, 150—Diminution of business brought before the second division in the last year or two, from greater confidence being placed in the judgments of the outer house, and also from a diminution of business in that house, *Thomson*, 181–183—If the spirit of the Act of 1825 were carried out, there would be ample work for both divisions, *Alexander*, 367—Extent of business at present before the

**INNER HOUSE:—1. Business of the Inner House—continued.**

the first and second divisions, *Darling*, 1155-1158—Table showing the arrears of business in the Court of Session on 1 January 1832-1840, being number of causes ready for judgment, exclusive of jury causes in the first and second divisions of the inner house, made up from annual returns to Parliament, *Darling*, 1161—There is no business performed by the inner house which might be transferred to the lord ordinary, *M'Neill*, 1499-1503—Two inner chambers are sufficient, *Alexander*, 565.

**2. Its Jurisdiction as a Court of Review.**

Number of divisions and number of judges of which each is composed, *Rep.* iii.—The two divisions are equal and co-ordinate, *Rep.* iii.—The lords ordinary and the inner house decide the case upon the same documents, with the exception that the latter court has the lord ordinary's note, *Thomson*, 342-346—It was enjoined by the original Commission, that the appeal to the inner house should be by note of facts, and that nothing should be said in the way of argument, *G. J. Bell*, 2606—Opinion that the inner house should be a court of review in all cases, *Stodart*, 1749, 1750—No witness of any weight examined before the Law Commission wished to cut off the jurisdiction of review from the Court of Session, *Lord Advocate*, 102—Manner in which the judges of the inner house, previous to 1825, dealt with cases brought before them from the outer house, *Alexander*, 356-358—Mode of proceeding when a judgment of the lord ordinary's is brought under review, *Rep.* iii.; *Alexander*, 403-411—Manner in which the present system of review in the inner house originated, *Alexander*, 424.

**3. Dissatisfaction at the mode of disposing of Causes therein.**

Motion for amending Report relative to; amendment proposed to leave out certain words; question, that the words stand part, *Ayes* 1, *Noes* 7, *Proc. in Com.* pp. xi. xii.—The practice of the inner house under the Act has not given the same satisfaction to the public and the profession as that of the outer house, *Rep.* v. vi. viii.; *Lord Advocate*, 45; *Stodart*, 1910-1912; *G. J. Bell*, 2577-2579—Dissatisfaction at the mode of hearing causes in the inner house as compared with the outer house, is not to an extent to demand inquiry, and will gradually diminish, *Dean of Faculty*, 1313-1316—The mode in which the inner house judges dispose of the cases brought under their review is not satisfactory to suitors, *Rep.* v. vi. viii.; *Mr. Wallace's proposed Report, Proc. in Com.* p. xiv.; *Alexander*, 423, 527-533; *Waddell*, 589; *Hunter*, 1949-1952; *R. Bell*, 2457-2460; *Solicitor-General of Scotland*, 2855—The dissatisfaction expressed in 1833 still continues, and very much from the same causes, *G. J. Bell*, 2580-2585—It was the opinion of the whole profession, but the evil is progressively giving way, *Solicitor-General of Scotland*, 2796-2802.

The hearing in the inner houses has been very little improved in the last two years, *Alexander*, 520, 521—Causes should be heard there in the same manner as they are on appeal in the Lords, *Alexander*, 522—Summary manner in which cases are disposed of in the inner houses without special reasons for judgments, *Waddell*, 612; *Hunter*, 1940—There is great want of confidence in the inner houses generally, *Miller*, 2179, 2180, 2256—Detail of the causes of dissatisfaction at the hearing in the inner house, *Hunter*, 1949-1952; *G. J. Bell*, 2586, 2587—In what respect the dissatisfaction is most felt, *Solicitor-General of Scotland*, 2803—Manner in which the bench and the bar are both partly to blame for the imperfections in the proceedings of the inner house, *Solicitor-General of Scotland*, 2837—No alteration necessary with a view to improvement of the proceedings of the inner house, *Dean of Faculty*, 1648, 1649.

**4. How far the Judgments of the two Divisions are uniform.**

Their judgment is final, subject only to appeal to the House of Lords, *Rep.* iii.—The two divisions differ in their practice with regard to motions; one granting them as a matter of course, the other totally rejecting them, *Hunter*, 1976-1982—Dissatisfaction of suitors from the diversity of judgments pronounced by the two different divisions, has led to a diminution of the business of the Court of Session, *Stodart*, 1672—There was more confidence in the ultimate decisions of the court prior to its division into two chambers, than there has been since, *Stodart*, 1828-1832—Diversity of decisions and small majority in the event of a division among the judges, is one cause of the increase of appeals to the House of Lords, *Stodart*, 1880—The judges sometimes differ in the conclusions they form from the statements of facts made on one side or the other, *G. J. Bell*, 2655-2660.

Two co-ordinate courts of equal jurisdiction cause great uncertainty both as to law and practice, *Hunter*, 1983, 1984, 1988—Experience teaches that two co-ordinate courts have not tended to produce uniformity of decision, *Hunter*, 1988, 2086, 2107; *Miller*, 2412-2414—The two inner houses are more likely to produce conflicting than unanimous judgments, and the more causes a court tries the greater will be its experience, *Mr. Wallace's proposed Report, Proc. in Com.*, p. xxiv.; *Miller*, 2202-2214—How far the two divisions are satisfactory as producing uniformity of judgment, *Alexander*, 513-518, 519—There is not much want of uniformity of decision in the two courts, *Waddell*, 700, 701—Having but one chamber, would do away with the disadvantage which results from consulting another division, without improving the character of the judgment in the opinion of the profession, *Stodart*, 1757—One court could insure uniformity of decision, but which can be done by a united judgment, *G. J. Bell*, 2751-2764.



## Report, 1840—continued.

**INNER HOUSE:—5. Opinions in favour of doing away with one of the Divisions.**

Observations relative to, *Mr. Wallace's proposed Report, Proc. in Com. p. xxvi.*—Observations relative to decrease in the number of judges proposed in 1785, *Mr. Wallace's proposed Report, Proc. in Com. p. xxvi.*—Nature of the improvements suggested, by which one of the inner houses might be done away with, *Darling, 1172–1191*—Opinion in favour of striking off one division, leaving the other division to consist of four judges, and the outer house of five lords ordinary, as at present, *Stodart, 1679–1682. 1705–1710*—Opinion in favour of one inner house consisting of four judges; and that the delay of business, arising from the absence of judges, is not of frequent occurrence, *Miller, 2133, 2134. 2143–2162*—If only one division, and that divided in opinion, a lord ordinary must be called in, *Waddell, 801*—Further advantages that would result from having one chamber instead of two, *Stodart, 1756, 1757*—If there were but one division, the evils as to the inner house would be entirely removed, and as to the outer house would be greatly alleviated, *Hunter, 1988*—If *vivâ voce* pleadings were introduced to the extent contemplated by the Judicature Act, still the inner house might be reduced to one division, with four judges, *Stodart, 1807–1809*—Amount of saving to the public from the abolition of one chamber, but which is not the chief object, *Stodart, 1844, 1845.*

One court would overtake three times the business, with lengthened *vivâ voce* discussion included, *Stodart, 1847–1849. 1851, 1852*—Advantages of there being but one chamber; it could get through all the business that ought to come before it, *Hunter, 1988–1990*—Further evidence against two divisions, and that they do not operate as a check upon each other, *Stodart, 1892–1906*—Nature of arrangements that might be made to prevent the inner house getting into arrear if there were but one division, *Hunter, 2022–2025*—Increase of business would take place if the improvements suggested were carried into effect, but not to the extent of preventing one court doing the business, *Hunter, 2066, 2067*—One inner division would be competent to do the business in the manner in which it is done at present, and to bestow more attention on it, *Miller, 2130–2132*—There is more chance of getting first-rate judges for one court than for the two divisions, *Miller, 2200*—Whether one court sitting five or six hours, and putting out double the number of causes, would be able to devote more time to *vivâ voce* hearing, *Miller, 2293–2295*—The opinion in favour of one inner house with four judges being sufficient is founded on the length of time of public sitting of each division, *Miller, 2309–2344.*

**6. Objections to doing away with one of the Divisions.**

Impracticable to reduce the number of divisions, *Mr. Wallace's proposed Report, Proc. in Com. p. xxvi.*; *Rep. vii.*; *Sir William Rue, 150*; *Dean of Faculty, 1284. 1290. 1312*; *R. Bell, 2435*; *Solicitor-General of Scotland, 2858–2863*—It would at present be a hazardous experiment, *Solicitor-General of Scotland, 2808–2810*—It would not be an improvement to have the lords ordinary and one division of the inner chamber, *Lord Advocate, 86*—Opinion that one division could not do the business of the court, *Lord Advocate, 73*; *Dean of Faculty, 1284–1312*; *M'Neill, 1450*; *G. J. Bell, 2751–2764*—If the business were conducted in the manner contemplated when the Judicature Act passed, one division would not be enough to overtake the business, *Alexander, 374*; *G. J. Bell, 2622–2623*—If the inner chambers were reduced to one, and the business conducted in the same manner as before the lords ordinary, they would require to sit the whole year, *Waddell, 684–687*—Alteration by making one division instead of two, would cause a very great accumulation of arrears, *Thomson, 204.*

See also *Appeals to the Court of Session. Appeals to the House of Lords, 1. 3. Arrears of Causes. Choice of the Division of the Inner House. Compromises. Counsel. Decrees in Absence. Hearings in Presence. Hour of Meeting. Inhibition and Arrestment. Judges of the Court of Session. Judges of the Inner House, 111. 14. 5. Judgments, 2. 3. Law Commission. Lord Ordinary's Note. Lords Ordinary, 5. Parole Argument, 3, 4. Petitions to the Inner House. Ranking and Sale. Record. Reserved Points. Rolls of Causes. Routine Business. Sequestrations. Session, Period of. Short Roll. Sittings of the Courts. Teind Court. Tenor. Written or Printed Arguments or Cases.*

**Interdict.** The Bill Chamber is always open for the purposes of, without vacation, *Lord Advocate, 58.*

**Interim Appointments.** There should be a power of making interim appointments in vacation, even if permanent appointments were put off till the session, *Hunter, 2065.*

**Ivory, James.** (Analysis of his Evidence.) *Solicitor-General of Scotland, 2785*—At the Scotch bar since 1816, 2786—Latterly in extensive practice, 2787—The object of the Judicature Act was to do away with the abuses arising from the excess of written pleadings, 2788–2790—The mode of hearing and deciding causes before the lords ordinary has given complete satisfaction, 2791–2795—The dissatisfaction at the operation of the system in the two divisions of the inner house, as expressed in the report of the Law Commission in 1833, was the opinion of the whole profession; but the evil is progressively giving way, 2796–2802—In what respect that dissatisfaction is most felt, 2803—Necessity for as full *vivâ voce* pleading in the inner house, as there is in the outer house, and before the House of Lords, 2804, 2805.

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## Report, 1840—continued.

*Ivory, James.* (Analysis of his Evidence.)—continued.

The grounds of judgments are not sufficiently fully stated in the inner house, though there has been great improvement latterly, 2806—Reduction to one division would at present be a hazardous experiment, 2808–2810—A fuller hearing required as a satisfaction to parties; the system of 1825 not carried out to the full extent of which it is susceptible; causes to which attributed, 2811–2813—Opinion in favour of the present number of judges in the inner house, 2814—Number of lords ordinary should not be reduced, 2815, 2816—Abolishing the choice of lords ordinary would be short-sighted and unwise, 2817—The remedies suggested of not giving the record to the judges, and not giving an opinion upon the day on which the cause is heard, should not be laid down as a rigorous rule by legislative enactment, 2818–2821—At present the party should be heard, without the court having read either the record or the note; but if they fully hear the argument, neither that or any other means of information should be withheld from them, 2822–2824.

Condescendence and answers are prepared, sometimes partly with a view to a fuller hearing in the inner house, and sometimes to avoid getting into the jury court, 2825, 2826—Cases are sometimes ordered in the inner house, with the view of obtaining a fuller hearing, 2827—Nature of a hearing in presence, which ought constantly to be adopted, 2828–2832—Nature of motions of course and incidental proceedings that might have been transferred to clerks, instead of the time of the judges being wasted upon them, 2834–2836—Manner in which the bench and the bar are both partly to blame for the imperfections in the proceedings of the inner house 2837—Number of judges that have been transferred from the outer to the inner house, and effect it has had in procuring greater attention to *vis à voce* arguments, 2838, 2840.

Objection to constant discussions and legislative enactments to improve a system which has not had time to get into fair work, and which ought only to be altered by acts of sederunt, 2841–2847—How far the court have followed the plan of the clause in the bill of Sir Islay Campbell in 1785; of revising acts of sederunt as occasion might require, 2848–2851—The court has not suggested to Parliament any proposal for doing away with doubtful points, 2852–2854—Manner in which the public feel the evil of the mode in which causes are heard in the inner house, 2855—Expense to the parties of settling points of form arising upon new statutory enactments, 2856, 2857—Further evidence against doing away with one division; the decrease of business may not arise from permanent causes, 2858–2863—Number of judges and extent of sittings of the Justiciary Court, 2864–2867—Number of circuits in Scotland; number of towns visited; there is not sufficient business for counsel, and no civil business, 2868–2874.

Trying civil causes by jury in Scotland is less expensive where there is length of proof to be taken, than where proof is taken by commission, 2875, 2876—When necessary, a commission follows the autumnal circuit to Glasgow to try civil causes; how far it causes additional expense, 2877–2882—Causes why jury trial is less popular in civil than criminal cases, 2883–2886—Examination upon criminal trials before the Justiciary and Circuit Courts; increase therein; extent to which more business has been transferred to sheriffs' juries, 2887–2894—Increase in the number of those who plead guilty, 2895–2896—Judges are longer on the circuit than they used to be, 2897–2900—Powers of the advocate depute in criminal trials, and on what occasions offenders are handed over to the sheriff, 2901–2905—Why it is not advisable that sheriffs should have the power to award the punishment of transportation, 2906–2912.

*Issues.* Mode of making up issues in jury cases formerly and at present, *Waddell*, 717–723—Expense and delay under the present mode of framing issues, *Darling*, 1029, 1030.

## J.

*Jamieson, Mr.* His concurrence in the opinion of the Dean of Faculty before the Commission in 1834, that the judges of the inner house should have nothing to read till they had heard the cause, *G. J. Bell*, 2608.

*Jeffrey, Lord.* See *Counsel*, 4.

*Judges of the Court of Session.* There are 13 judges in the supreme court of Scotland, *Mr. Wallace's proposed Report, Proc. in Com. p. xiv.*—Proposals for reduction, *ib. xxvi.–xxviii.*—Before 1808 the whole 15 judges might have sat together, the quorum being nine, *Lord Advocate*, 7—It would have been more advantageous to have retained 15 judges, and had seven as lords ordinary, *Dean of Faculty*, 1342—Alterations which took place with regard to the number and distribution of the judges, by the Act of 1825, and further alteration in 1829, *Sir William Rae*, 143—The constitution of the court in 1823, which sometimes caused an equal division of opinion among the judges, was one cause assigned for the increase in the number of appeals to the House of Lords, *Sir William Rae*, 143—Number of judges of which the inner chambers and lord ordinary's courts consist, *Waddell*, 581–585—Report of the Judges of the Court of Session to the House of Lords relative to acts of sederunt, dated 27 February 1810, *App. p. 239*—Bill for augmenting the salaries and lessening the number of the judges in the Courts of Session and Exchequer in that part of Great Britain called Scotland, *App. p. 249*.

See also *Exchequer Business. Government. Justiciary Court.*

## JUDGES OF THE INNER HOUSE:

I. *Opinions against reducing their present number.*

*Opinions in favour thereof.* See *Inner House*, 5. 6.

II. *Promotion from the Outer House to the Inner House.*III. *Extent of their Duties.*IV. *Reading the Record and Cases by them.*

1. Quantity of matter they are required to read.
2. Time occupied by them in that duty.
3. How far they do read them.
4. Whether they should read them previously or subsequently to hearing Counsel.
5. Opinions against previous reading.
6. Effect of previous reading on hearing the arguments of Counsel.

I. *Opinions against reducing their present number.*

A reduction in the number of judges would be very unfavourably received; there is occupation for the whole of them, *Rep.* vi. vii. viii., *Sir William Rae*, 151; *Thomson*, 198–203; *Alexander*, 368, 369; *Waddell*, 757–804. 806; *M'Neill*, 1630; *Robert Bell*, 2423, 2424. 2436; *G. J. Bell*, 2661, 2662; *Solicitor-General of Scotland*, 2814—Reduction of business has not taken place sufficiently to justify a reduction in the number of judges, *Sir William Rae*, 149; *Dean of Faculty*, 1257—Part of the benefit of the opinion of the consulted judges would be lost if the number of judges were reduced, *Waddell*, 802, 803.

Inconvenience that would result from reducing the number of judges in the inner division below four, *Rep.* vii.; *Lord Advocate*, 74; *Thomson*, 198–203; *Waddell*, 759, 760; *Dean of Faculty*, 1646; *Stodart*, 1683, 1684; *G. J. Bell*, 2624, 2625—A fewer number of judges than four would not be a good number for a court of review, *M'Neill*, 1451—If only one inner house, four judges would be the best number, *Miller*, 2133—The chance of equality of decision is as great in four judges as it would be in three, *Darling*, 1202–1204—Best way of extricating a case when the opinions of the judges are equally divided, *Stodart*, 1758–1765—If four judges are divided in opinion, a lord ordinary is called in according to the Act, *Waddell*, 875, 876; *Miller*, 2134—Resolution of the Society of Writers to the Signet against reduction, 6 February 1840, *App.* p. 244.

II. *Promotion from the Outer House to the Inner House.*

Names of judges who have not been used to *viva voce* pleadings as lords ordinary, *Waddell*, 615, 616—Number of judges that have been transferred from the outer to the inner house, and effect it has had in procuring greater attention to *viva voce* arguments, *R. Bell*, 2510; *Solicitor-General of Scotland*, 2838–2840—Names of the judges who have been transferred from the outer house to the inner house in the last five years, *Alexander*, 491–495; *Dean of Faculty*, 1324—New judges having been brought from the outer house to the inner house, has improved the mode of proceeding latterly, *Solicitor-General of Scotland*, 2806.

III. *Extent of their Duties.*

Period when the judges sit in the two inner chambers, and as lords ordinary; when they go the circuit; when they sit as Commissioners of Teinds, and when they sit for Exchequer business; number of hours which they sit, *Lord Advocate*, 83–85—Whether allowing the judges to choose their divisions annually would be advantageous, *Alexander*, 503, 564—The question whether the senior or the junior judge should deliver his judgment first, could be settled by act of sederunt, *Alexander*, 560–562—They are appointed from among the sheriffs and the bar, *M'Neill*, 1621, 1622—Cases of interest or relationship in which judges are disqualified from sitting, *Miller*, 2135–2142.

Nothing could be more erroneous than to judge of the work done by the judges from the number of hours that are occupied by them in court, *Rep.* v. vi.; *Lord Advocate*, 86—The return of the number of hours of the sittings of the inner house is no criterion to the business before the judges, or of the work they have to perform, *Lord Advocate*, 86; *R. Bell*, 2451, 2452; *G. J. Bell*, 2618–2620—They have enough to occupy them, but more time might be given to hearing cases in court than is given, *Rep.* vii.; *Lord Advocate*, 116—Examination upon the extent of business before different judges, and upon certain of them having also the duties of the Exchequer and Justiciary, *G. J. Bell*, 2765–2777—Confidence placed in them by the profession, but the public would be more satisfied at having more duty done in public, *Solicitor-General of Scotland*, 2803.

IV. *Reading the Record and Cases by them.*

## 1. Quantity of matter they are required to read.

If the quantity of matter is less, the difficulty of acquiring knowledge is greater, *Rep.* vii.—Number of quarto pages which each division of the inner house was bound to peruse in 1829, *Lord Advocate*, 82—They are required to read but a very small portion of

**JUDGES OF THE INNER HOUSE:—IV. Reading the Record and Cases by them—continued.****1. Quantity of matter they are required to read—continued.**

of the voluminous written papers laid before them, the greater part consisting of appendixes, *Waddell*, 637—On the 1st of January the two chambers must have had the papers in 78 cases before them, *Darling*, 1237—They are generally accompanied by appendixes to documents, which it is not expected the judges shall read, but consult them for reference, *Miller*, 2240—Contents of appendixes to record, and how far necessary for the judges to read them, particularly as regards deeds of entail, &c., *Waddell*, 793–800—Examination upon the printed papers necessary to be read by the judges, 1823–1825 and 1836–1838, showing decrease in the latter years, *Stodart*, 1733–1734.

**2. Time occupied by the Judges in reading Papers.**

The study of cases at home is considered by the judges as a very laborious part of their duty, *Thomson*, 196—Although the written pleadings may be shorter, the time occupied by the judges at home is not shorter than formerly; and the judges have to refer to the cases themselves, *Rep.* vii.; *Thomson*, 243–256—Before 1825 they studied the cases out of court, and devoted a short time in court when they gave their judgment, *Rep.* vii.; *Alexander*, 359—The plan adopted before 1825, though not satisfactory, was more so than the present plan, as the judges were more fully aware both of the facts and the law of the case than they are now, *Rep.* vii. *Alexander*, 360, 361—Evidence upon the sittings of the court, and the time occupied by the judges in reading cases at home at present and formerly, *Dean of Faculty*, 1411–1416—The time that should be occupied by each judge in reading records, studying cases and writing out opinions, must depend upon the importance of each case, *Miller*, 2309–2344—Great portion of their time that is taken up in the study of cases at home, *Solicitor-General of Scotland*, 2810—If they were in court five or six hours a day, they would have ample time out of court to read all that was necessary, *Stodart*, 1729–1732; *G. J. Bell*, 2757–2763.

**3. How far the Judges do read their Papers.**

They have been most conscientious and faithful in the making themselves acquainted with the cases, *Rep.* viii.; *Thomson*, 322—They generally in the inner house appear to have formed some opinion before coming into court; they sometimes state from the bench that upon reading the record they have no doubt about the case, *Alexander*, 405–406—How far they do actually read the papers before giving their judgment; there is a general impression that they decide the cases without sufficient reading or hearing, *Alexander*, 534, 551—Opinion that the greater part of the judges do study their papers in private, but there may be instances to the contrary, *Darling*, 1235–1245.

**4. Whether they should read their papers previously or subsequently to hearing counsel.**

It would not be advisable to prevent the judges from reading the papers till they come into court, *Lord Advocate*, 141—Preventing judges from having access to the papers till they have heard oral discussions at the bar, would not be an improvement, *Rep.* vi.; *Thomson*, 215—Examination upon the study of cases by the judges at home, on the record; whether advisable or not that they should make themselves masters of the case, and the law bearing thereon, previously to, or subsequent to, hearing the oral arguments of counsel, *Thomson*, 281–302—Judges should have the papers as the Lord Chancellor has them, but they should be as much read after hearing counsel as before, *Alexander*, 523.

Dissatisfaction arising on one side from doubts whether the judge has read the papers, and on the other from the feeling that he ought not to do so, would be obviated by longer sittings in court and fuller hearings, *Waddell*, 852–864—Subsequent experience has caused witness to consider that his evidence before the Law Commission of 1833 was wrong, and that the judges should have a previous knowledge of the case, to a certain extent; instance of waste of time where the judges have been specially requested not to read the papers, *Dean of Faculty*, 1266–1277. 1383–1395—The difficult position of the judges, who are charged on one hand with being too well apprised of the facts, and on the other with not having read their papers, arises from the curtailed pleadings under the Judicature Act, and the not permitting sufficient time for oral pleading, *Darling*, 1252–1253.

**5. Opinions against previous reading.**

Judges should not read the papers till after hearing counsel, *Rep.* viii.; *Stodart*, 1729–1732. 1853–1874; *Miller*, 2168–2178; *G. J. Bell*, 2638–2649—The judges of the inner house should not see the record or lord ordinary's note till counsel begin to address them, *R. Bell*, 2467; *G. J. Bell*, 2608—At present the party should be heard without the court having read either the record or the note; but if they fully hear the arguments, neither that nor any other means of information should be withheld from them, *Solicitor-General of Scotland*, 2822–2824—Opinion of eminent witnesses before the Commission in 1834 that the judges of the inner house should have nothing to read before they hear the cause, *G. J. Bell*, 2608–2610—Extent to which the previous reading of judges might with advantage be done away with, except where there are written cases, *Hunter*, 1995–2013.

**JUDGES OF THE INNER HOUSE :—Reading the Record and Cases by them—continued.****6. Effect of previous reading on hearing the Arguments of Counsel.**

Their having already formed their opinions from reading the record, creates a degree of impatience in hearing counsel, *Alexander*, 406, 407. 416. 552-559; *Waddell*, 877-894; *Darling*, 1146-1151; *Dean of Faculty*, 1325-1330; *Miller*, 2364-2376; *R. Bell*, 2444-2447; *G. J. Bell*, 2587. 2705-2715. 2745—From a mistaken continuance of old habits, they try to make themselves masters of the facts, and form an opinion of the law before they hear counsel, and they exhibit considerable impatience when counsel wish to go into a long discussion, *Mr. Wallace's proposed Report, Proc. in Com. p. xv.*; *Lord Advocate*, 34. 106-114; *Hunter*, 1950; *R. Bell*, 2439-2443 —Never meant by his evidence in 1833 to countenance the notion that there was impatience on the part of the judges in hearing statements of counsel; it is not exhibited by the divisions; not aware that a complaint exists at the bar upon the subject; does not think there is, nor is there such an impression among the community at large, *Dean of Faculty*, 1277-1281.

Opinion that the judges of the second division do not show impatience in hearing the arguments of counsel, when they are necessary, and do not appear upon the record, neither do they show greater partiality to a senior over a junior, *Thomson*, 211-213—Necessity for counsel being fully heard, *Rep.* viii.—No law can be passed to compel judges to listen more patiently than they do to parole argument, *Lord Advocate*, 105—No reflection cast on the judges; it is most natural that the older ones should continue the habits of 30 years as regards studying cases at home, *Rep.* ix.; *R. Bell*, 2506. 2511, 2512, 2513—At present the public is not all prejudiced by the study of papers by the judges in a way to cause any embarrassment, *Thomson*, 308-312; *Dean of Faculty*, 1266; *M<sup>r</sup>. Neill*, 1445-1449.

The judges have not been dispensed with studying the cases out of court, *Thomson*, 192, 193—Counsel consider an argument in many cases useless, the judges having made up their minds on the case at home, *Lord Advocate*, 140—A complete previous knowledge by the judge does not render superfluous a full statement from the bar, *Rep.* vi.—The counsel trust that the judges of the inner house have mastered the facts from reading the record, *Alexander*, 418-420—It was expected, from the change in 1825, that if the papers put before the inner house were more brief, the oral hearings would be longer, but which has not been the case, *Alexander*, 362-366—A suitor would be better pleased with an advocate's speech to a judge who did not know the facts than to one who did, *M<sup>r</sup>. Neill*, 1583-1588—Complaint of the judges not relying on *viva voce* pleading does not exist to the extent it formerly did, or to the extent stated by the *Lord Advocate*, *Sir William Rae*, 145—The judges not seeing the record till the argument, and giving judgment on a subsequent day, would insure a greater extent of *viva voce* discussion than at present, which would give greater satisfaction, *R. Bell*, 2467-2469—But should not be forced by legislative enactment, *Solicitor-General of Scotland*, 2818-2821.

See also *Acts of Sederunt. Appeals to the House of Lords*, 2. *Chamber Sittings. Circuits. Counsel*, 1. *English Judges. House of Lords. Inner House. Justiciary Court. Lords Ordinary.*

**JUDGMENTS :**

1. *Number of, previous to the Judicature Act.*
2. *Judgments in the Inner House should not be delivered the same day the argument is heard.*
3. *Evils of the grounds of Judgments not being sufficiently stated.*
4. *To what extent the evil has been remedied.*

**1. Number of, previous to the Judicature Act.**

Parties in the outer house could formerly go on representing and cross-representing till there were two consecutive judgments agreeing, *Lord Advocate*, 17; *Darling*, 1223-1225—Advantage of the Act 6 Geo. 4, c. 120, in preventing there being more than one judgment of either the lord ordinary or the inner house, neither of which judgments to come in review before the same judges, *Rep.* iv.; *Lord Advocate*, 18, 19—The number of judgments pronounced in the same cause was considered in 1823 to be one cause of the number of appeals to the House of Lords, *Sir William Rae*, 143.

**2. Judgments in the Inner House should not be delivered the same day the argument is heard.**

Advisable that a day should be set apart for the delivery of judgments, the delivery of them immediately after hearing being objectionable, *Alexander*, 548; *Stodart*, 1742-1748; *R. Bell*, 2467-2469. 2559-2563; *G. J. Bell*, 2613 —The committee do not agree in this suggestion, *Rep.* vi.—It is not usual for the inner house to take time to deliberate on their judgment after hearing the arguments of counsel, and it frequently happens that they differ among themselves, *Stodart*, 1804, 1805—Act of sederunt of 1825, for hearing the cause one day and giving judgment on another, has only been complied with on one occasion, and then a different one to what would have been immediately given, *R. Bell*, 2467—Extract from speech of the Right honourable Charles Hope, Lord President of the Court of Session, on this subject, 12 November 1825, *App. p.* 244.

**3. Evils**

## JUDGMENTS:—continued.

3. *Evils of the grounds of Judgments not being sufficiently stated.*

In many cases, as regards the inner house judgments, a want is felt of a deliberate statement of the grounds of the decision, and which is much felt in proceedings before the House of Lords, *Rep. vi.*; *Lord Advocate*, 53-55. 130-136; *Thomson*, 313-316. 321; *Waddell*, 612 *Miller*, 2290; *R. Bell*, 2477-2480; *G. J. Bell*, 2611, 2612—In what manner the Scotch courts have been unfairly treated in the House of Lords in sending their judgments back for re-hearing, and for full grounds for their judgments; evils of the practice, *Dean of Faculty*, 1282—When more is done in public than at present, the parties will know on what point the court put their judgments, which it is difficult even for the profession at present to know, *Robert Bell*, 2450—The unwillingness to give reasons for judgments arises from the habits of the old judges, who used before the Judicature Act to make up their minds from long written pleadings, who, not having been used to *virâ voce* argument, now make up their minds in the same way from the short records, *Waddell*, 614-617.

4. *To what extent the evil has been remedied.*

Necessity for a full statement in public of the grounds of the judgment, *Rep. viii.*—In many cases the inner house judgments are very fully given, particularly where they have had the opinions of the consulted judges, *Lord Advocate*, 53-55—The evil complained of, in the evidence before the Law Commission, as to the judgments being too shortly given, has in a great degree been corrected, *Dean of Faculty*, 1282—Opinion that the judges of the inner house deliver their judgments as much at length as is desirable, *Dean of Faculty*, 1331, 1332—In some cases the grounds of judgments are not stated sufficiently at length, but the evil is in a great degree cured, *M'Neill*, 1589-1592—Cases in which the judges of the inner house have recently adopted the practice of writing their judgments, *R. Bell*, 2470-2476—In important cases, and where the inner house differs from the lord ordinary, the grounds of the judgment are delivered fully, *G. J. Bell*, 2702-2704—The grounds of judgments are not sufficiently fully stated in the inner house, though there has been great improvement latterly, *Solicitor-General of Scotland*, 2806.

See also *Acts of Parliament. Appeals to the House of Lords*, 2. *Inner House*, 4. *Judges of the Inner House*, iv. 3. *Lords Ordinary*, 4. 6. *Petitions to the Inner House. Reversal of Judgments.*

*Judicature Act.* Its object, *Rep. iv.*—Effects of Act 6 Geo. 4, c. 120, *Sir William Rae*, 143—The change introduced in 1825 has given satisfaction to the bar and to the public, *Sir William Rae*, 147—The changes of 1825 gave rise to much vexation and expense, but which evil will correct itself, *Dean of Faculty*, 1259—The Act was too rigid in points of form, but the system was not erroneous, *Rep. v.*; *Dean of Faculty* 1260-1263—Part of the delay and expense of the Court of Session has arisen from the form of procedure being too rigidly laid down by the Act, *Miller*, 2271.

Defects of the system to be attributed to want of time for it to be brought into full operation, *Robert Bell*, 2513—The Act of 1825 has not produced all the effect expected from it, *Rep. vi.*; *G. J. Bell*, 2573—Observations thereon, *Mr. Wallace's proposed Report, Proc. in Com. p. xix.*—Manner in which it has been too strict with regard to pleading; difference between jury cases and those partaking of a chancery character; *G. J. Bell*, 2650-2654—Imperfections therein; suggestions for improvements contained in the First Report of the Law Commission; *Darling*, 967-971; *G. J. Bell*, 2731-2739.

See also *Acts of Parliament. Acts of Sederunt*, 2. *Inner House*, 5. 6. *Judges of the Inner House*, iv. 4. *Judgments*, 1. *Lord President of the Court of Session. Parole Argument*, 1. *Points of Form. Preparation of Cases*, 1. *Reclaiming Notes. Written or Printed Arguments or Cases.*

*Judicial Factors.* Manner in which the inner house should be relieved from petitions for their appointment, and the procedure consequent thereon, it being transferred to the lord ordinary, *Hunter*, 1954-1966.

*Jury Clerks.* They peremptorily insist on the attendance of counsel and agents at the preparation of issues; inconvenient hour at which they meet, and which might be altered by the direction of the president of the court; *Darling*, 1021-1028—Observations relative to, *Mr. Wallace's proposed Report, Proc. in Com. p. xvii.*—Agents are not allowed to be heard before them, by act of sederunt, *Waddell*, 593-595.

See also *Sittings of the Courts*, 3.

*Jury Trial, Scotland.* Duty of the Court of Session with regard to, *Rep. iv.*—Observations thereon; *Mr. Wallace's proposed Report, Proc. in Com. p. xxii.*—Opinion in favour of jury trial, *Dean of Faculty*, 1382; *G. J. Bell*, 2684-2689—Its introduction has stopped many appeals to the House of Lords; it was introduced in 1815, *Lord Advocate*, 11—Introduction of juries has not proved very successful, but ultimately may be so; cases are enumerated in the Acts which must be tried by jury; *Lord Advocate*, 63, 64; *Thomson*, 332.

Report, 1840—continued.

*Jury Trial, Scotland—continued.*

The institution of trial by jury is very unpopular in Scotland, and reasons, *Lord Advocate*, 120-126; *Thomson*, 338-341; *Alexander*, 440-442; *Waddell*, 589, 590, 702-704, 726-742, 811, 812, 827-830; *Darling*, 1140, 1141; *Dean of Faculty*, 1382, 1654-1658; *M'Neill*, 1614; *G. J. Bell*, 2684-2689, 2740-2744; *Solicitor-General of Scotland*, 2883-2886—The expense one cause of its unpopularity, *Thomson*, 338-341; *Darling*, 1128, 1129, 1140, 1141; *G. J. Bell*, 2684-2689, 2740-2744; *Solicitor-General of Scotland*, 2885—The expense being more immediate is less liked by the parties, though the actual expense is less, *Lord Advocate*, 120-126; *Solicitor-General of Scotland*, 2875, 2876—The introduction of jury trial in its present form, and to its present extent, is one cause of the diminution of business in the Court of Session, *Alexander*, 395; *Darling*, 1128, 1129—It would be injudicious to compel the people of Scotland by legislative enactment to adopt trial by jury, *Waddell*, 831; *G. J. Bell*, 2684-2689.

It is the general opinion that it would be better for Scotland that jury trial in civil causes should be denied altogether than proceed in its present form, *Waddell*, 715, 725—The forms of trying civil cases and criminal cases with the aid of a jury, in Scotland, are materially different, *M'Neill*, 1623, 1624—Cause of a great proportion of jury causes being compromised immediately before trial, *Lord Advocate*, 127, 128; *Solicitor-General of Scotland*, 2886—Juries are too little under the control of the court, *Lord Advocate*, 129—The jury court was abolished by Act 11 Geo. 4, and 1 Will. 4, c. 69, and trial by jury vested entirely in the Court of Session, *Sir William Rae*, 143; *Waddell*, 639.

Since it has merged in the Court of Session, jury trials take place before the heads of the court in Edinburgh, and on circuit by the Justiciary judges, or judges of the Court of Session sent specially for the purpose, *Lord Advocate*, 62—They are generally tried in vacation, immediately after the court rises, *Darling*, 942—Sittings of the court for jury trials after the close of the session in Edinburgh, *Dean of Faculty*, 1381—Reason why they are tried after the end of the session; they might be tried every Monday, if it was wished, or there were enough enrolled, *Dean of Faculty*, 1396, 1397—Practice of jury trial before sheriffs on assessing damages for canals, railroads, &c. under special statutes, *M'Neill*, 1606-1610—Opinion against sheriffs trying civil causes by jury trial, *M'Neill*, 1611-1619, 1620.

See also *Record. Special Cases.*

*Justice of the Peace Courts.* Extent of jurisdiction of, *Miller*, 2387.

See also *Appeals to the Court of Session.*

*Justiciary Court.* Its jurisdiction and sittings, *Rep.* iv.—Suggestions for its sitting with two judges or one, as on the circuit, providing for a quorum when necessary, *Rep.* ix.—Observation thereon, *Mr. Wallace's proposed Report, Proc. of Com.* p. xxiii.—The supreme criminal court of Scotland, though constituted by a separate Commission from the Court of Session, consists entirely of judges of the Court of Session, *Lord Advocate*, 58—Monday is required by some of the judges for trial of causes in the Justiciary court; three are a quorum therein, *Darling*, 1227-1229—Sittings therein arranged by the judges privately, *Darling*, 1930, 1931—Number of judges and extent of sittings therein, *G. J. Bell*, 2748; *Solicitor-General of Scotland*, 2864-2867.

See also *Criminal Business. New Trials. Removal of Counsel and Witnesses. Sheriff Courts, 2. Sittings of the Courts, 1.*

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*Law Commission, Scotland.* Report by that of 1833 as to dissatisfaction in the Court of Session, *Rep.* vi.—Alterations made in the constitution of the two divisions of the Court of Session by Act 6 Geo. 4, c. 120, was in consequence of a Parliamentary Commission, *Lord Advocate*, 7—Reference to evidence before the Law Commission in Scotland, as to written evidence and rapidity of decision in the inner house, *Lord Advocate*, 41—Examination upon the first Report of the Law Commission as to the dissatisfaction stated to exist with regard to the Court of Session, and the reforms suggested therein, *Lord Advocate*, 103.

Of whom the Commission for inquiring into Scotch judicature in 1823 consisted; its report in 1824, on the recommendations contained in which the Act of 1825 was founded, *Sir William Rae*, 143—The recommendations made in the reports of, not having been carried into full effect, is one cause of the business of the Court of Session diminishing, *Alexander*, 395—Extract from the Report of the Law Commissioners against the mode of procedure in the inner house on reviewing judgments, *Alexander*, 425—Opinions expressed by the Law Commission are well founded, and their adoption in practice would be useful, *Darling*, 955-958, 962-966—The recommendations of, have not all been carried into effect; periods their reports have been published, *Darling*, 972, 973—Extract from page 39 of first Report from Law Commissioners, Scotland, *App.* p. 243.

See also *Clerks of the Court. Dean of Faculty. Fisher, Daniel. Local Courts. Lord Ordinary's Notes. Sittings of the Courts, 2.*

*Legislative*



**Legislative Enactment.** See *Acts of Parliament*.

**Legitimacy.** In questions relative to, the necessity for reading the papers would remain with the judge, *Stodart*, 1867.

**Litigation.** The mode of making up the record under Act of 1825 has prevented litigation, by causing many cases to be stopped *in limine*, that would otherwise have been discussed in court, *Sir William Rae*, 143—Decrease in the spirit of, is one cause of the decrease of business in the Court of Session, which is caused by increased intelligence and better education, *Darling*, 914. 916. 1212—Decrease in the number of litigated causes since 1831, *Stodart*, 1668, 1669—The fondness for litigation among the Scotch people is the exception, *Miller*, 2253.

**Local Courts.** Many witnesses examined before the Law Commission, who were anxious to extend the jurisdiction of the local courts, *Lord Advocate*, 102—Objection to a number of local courts, with unlimited jurisdiction in civil causes, and in which jury trial does not and could not advantageously take place, *Dean of Faculty*, 1655—Improvement in the administration of, and extension of the jurisdiction of, is one cause of the diminution in the business of the Court of Session, *Waddell*, 763; *Hunter*, 1938; *Miller*, 2242, 2243—More judgments from inferior courts would be appealed against, if it could be done with less delay and expense, *Hunter*, 2067–2071.

See also *Maritime Causes*. *Sheriff Courts*.

**Lord Advocate.** (Analysis of his Evidence.) See *Rutherford*, *Right Hon. Andrew*.

**Lord Justice Clerk.** His duties in the Justiciary Court, *Rep.* iv.—Cases before the year 1808 were prepared and decided before him or one of the puisne judges, with appeal by review to the inner house; alteration made by Acts 48 Geo. 3, c. 151; 50 Geo. 3, c. 112, and 6 Geo. 4, c. 120; *Lord Advocate*, 7—He has not been used to *vivâ voce* pleadings as a lord ordinary, *Waddell*, 616—His absence from illness did not cause interruption to business, though his presence in court would have been desirable, *Miller*, 2152–2158.

**Lord Ordinary's Note.** Observation relative to, *Rep.* viii.; *Mr. Wallace's proposed Report*, *Proc. in Com.* p. xv.—Practice of lord ordinary to give a note, stating the grounds of his decision; the opinion of the bar is divided as to the advantages of the practice, *Lord Advocate*, 35–41. 50, 51; *M'Neill*, 1579–1582—The lord ordinary's note was substituted for a *vivâ voce* opinion shortly after the statute of 1825, *G. J. Bell*, 2602–2604—Advantage thereof; they frequently prevent a reclaiming note to the inner house, *Waddell*, 790–792—Great length of lord ordinary's notes, and how far they lead to more reclaiming notes than acquiescence in decisions, *Dean of Faculty*, 1376–1380.

Objection to the lord ordinary's note, which should be constructed differently, *Alexander*, 399–400—What it ought to contain, *Alexander*, 524–526—Doubts as to the benefit of them, with reasons, *Dean of Faculty*, 1266—Their long notes are partly written in a misapprehension that their's is a separate court, *Dean of Faculty*, 1269.

The lord ordinary's note does not form the chief subject of consideration in the inner chamber; it is considered along with the record, but with such consideration as its importance deserves, *Lord Advocate*, 117, 118—This document sometimes causes the inner house to challenge the grounds of the judgment, rather than acquiesce in them, *Thomson*, 342–346—Why this document is not calculated to assist the inner house judge in forming a correct opinion, *Alexander*, 409–412—Since the evidence given before the Law Commission a change has taken place, and the lord ordinary's note does not form the law of the case; the judges state their grounds of difference of opinion with the lord ordinary, although they may concur in the result, *Dean of Faculty*, 1283.

Judges in the inner house frequently make up their minds from the statement of the lord ordinary, in which case it is difficult for a young man to get fully heard, *Robert Bell*, 2463—The inconvenience of it is, that it forms an elaborate argument in its own favour, and that there is no argument against it, *G. J. Bell*, 2607—Comparison between the notes of different lords ordinary, *G. J. Bell*, 2724, 2725—Opinion in favour of a *vivâ voce* judgment of the lord ordinary, but which might also be reduced to writing, *G. J. Bell*, 2587. 2605. 2663–2675. 2690–2694. 2721–2725.

**Lord President of the Court of Session.** His jurisdiction and duties with other judges under various Acts of Parliament, *Rep.* iv.; *Lord Advocate*, 7—He has not been used to *vivâ voce* pleadings as a lord ordinary, *Waddell*, 616—The opinion of the lord president at the time the Judicature Act passed was, that judgment should be given on a subsequent day to that of hearing counsel, *Stodart*, 1742–1748—Copy of his speech delivered in, *Stodart*, 1812–1814—Extract from the speech of the Right honourable Charles Hope, Lord President of the Court of Session, to that effect, *App.* p. 244.

## LORDS ORDINARY:

1. *Their Constitution and Duties.*
2. *Causes of favourite Lords Ordinary.*
3. *Causes of delay, and necessity of distributing business.*
4. *Satisfactory manner of conducting business.*
5. *Advantages of allowing them to sit in the Inner House.*
6. *How far their decisions are acquiesced in.*
7. *Opinions for and against reducing their numbers.*

1. *Their Constitution and Duties.*

Constitution of permanent lords ordinary under Act 6 Geo. 4, c. 120, *Rep.* iii.; *Lord Advocate*, 7—Observations relative to Mr. Wallace's proposed Report, *Proc. in Com.* p. xiv.—Permanent lords ordinary were first appointed in 1810, *Darling*, 1206—Their duty in the preparation of causes and bringing the case to a point; they do not form a separate court, and the divisions are not considered as a court of appeal, *Lord Advocate*, 6; *Hope*, 1269; *Dean of Faculty*, 1295, 1296—Laborious nature of their duties, *Hunter*, 1991–1993—Since 1825, by the introduction of *viva voce* pleadings, the lords ordinary have been generally overburthened with business, *Waddell*, 641, 643—Under the last Act they do Exchequer business under certain rotations, *Lord Advocate*, 82—Their duties could not be devolved on other parties with advantage, *Alexander*, 443—Stages of an ordinary action in the Court of Session till the decision of the lord ordinary is obtained, *App. p.* 243—Tabular view of the business before the lords ordinary during the winter session, 1839–1840, *App. p.* 247.

2. *Causes of favourite Lords Ordinary.*

The court never had better judges than those who now sit in the outer house, *Hunter*, 1941—Causes of favourite lords ordinary, *Thomson*, 240–242—Industry and talent alone is the cause of favouritism of certain lords ordinary, *Waddell*, 655—The choice of lord ordinary now allowed, and the means of obtaining it formerly, causes an accumulation of business before certain lords, *Alexander*, 389–392—Parties have not the power of removing a case from one lord ordinary's roll to another; how far such an application would be likely to be granted if made by both parties in many suits, *Dean of Faculty*, 1421–1428.

3. *Causes of delay, and necessity for distributing business.*

Chief causes of delay before the lords ordinary, *Stodart*, 1768–1770; *Hunter*, 1940–1942, 2118–2123—Remedies suggested for delays before the lords ordinary, *Stodart*, 1771–1775—Want of all proper arrangement or distribution of the various branches of business, *Hunter*, 1942, 1943—Whether arrears before certain lords might be got rid of by an equal distribution of business, *Sir William Rae*, 171–177; *Thomson*, 205–210; *Dean of Faculty*, 1298, 1299, 1304–1309; *Stodart*, 1766, 1767, 1772—Opinion against the distribution of business among them, *Dean of Faculty*, 1298, 1299; *M'Neil*, 1572–1578; *R. Bell*, 2429–2432, 2553, 2554.

4. *Satisfactory manner of conducting business.*

Mode in which causes are heard before the lord ordinary, *Lord Advocate*, 13, 14; *Waddell*, 610—From the commencement, parole discussions before them have been extremely satisfactory to the profession; they have been very full, *Rep.* v; *Lord Advocate*, 31, 32; *Dean of Faculty*, 1647; *R. Bell*, 2453–2455; *G. J. Bell*, 2574–2576; *Solicitor-General of Scotland*, 2791–2795—They do not form their opinions from reading the record till they have heard counsel, *Alexander*, 412, 413—Though there is great delay, there is great satisfaction when the judgments of the lord ordinary are obtained, *Miller*, 2179–2183—The preference in favour of the mode of conducting outer house business arises from there being a more full discussion, *Thomson*, 236–239.

5. *Advantages of allowing them to sit in the Inner House.*

Advantages that would be derived from having one of the lords ordinary sitting in the inner house in rotation, *Dean of Faculty*, 1285–1290, 1343–1349; *R. Bell*, 2511; *G. J. Bell*, 2624–2627—Whether he should be present in the court of review on his own judgment; how far he is supposed previously to have made up his mind, *Stodart*, 1758–1763—If the junior lord ordinary was called in to decide in the event of an equality, it would give greater satisfaction than calling in the other division, *Hunter*, 2059–2063—Reference to the evidence of the Attorney-General, Sir John Campbell, before the Law Commission, as to the inconveniences arising from the lords ordinary not sitting in the inner house, and to what extent the witness coincides therein, *R. Bell*, 2514–2521.

6. *How far their decisions are acquiesced in.*

Their decision final, if not appealed against to one of the divisions within a limited time, *Rep.* iii. iv. viii.; *Lord Advocate*, 10—Proportion of cases that have been finally decided in the outer house, *Lord Advocate*, 78—Number of final judgments pronounced by the outer house, 1819–1823, and 1835–1839; *Darling*, 991–997—No complaint of mode

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**LORDS ORDINARY:—6. How far their decisions are acquiesced in—continued.**

mode of proceeding before the lords ordinary; greater proportion of their judgments are acquiesced in, *Waddell*, 611—One-half of the causes heard before the lords ordinary are finally decided by them, and the proportion is increasing, *Miller*, 2236—Opinion of Lord Jeffrey before the Committee on Judges' Salaries, that the judgments of the lord ordinary acquiesced in amounted to one-half; but witness considers they would considerably exceed one-half the whole litigated causes, *Hunter*, 2043.

The proportion of cases brought under review is less in proportion to the total number of judgments in the outer house than it has sometimes been, *Thomson*, 276—Suitors are more satisfied with proceedings in the outer house than the inner house, though the number of judgments brought under review of the inner house is increasing, *Darling*, 977-979—Examination upon Parliamentary Returns, 1819-1823, and 1835-1839, showing the number of cases brought under review of the inner house, and number of final judgments by the lords ordinary, *Darling*, 989-997—It is not competent to the court to make their judgment final; it is only final by the parties acquiescing, *Dean of Faculty*, 1270-1274—They are not subordinate to the court; they are not officers of the court like Masters in Chancery; their judgment is the judgment of the court if the parties wish; they cannot prevent the judgment of the division if the parties so wish, *Dean of Faculty*, 1275.

**7. Opinions for and against reducing their numbers.**

If their sittings extended eight or ten weeks beyond those of the inner house, one lord ordinary might be dispensed with, *Darling*, 1222—Opinion against superseding the lords ordinary, or reducing their numbers, *Rep.* viii.; *Lord Advocate*, 75-81; *Sir William Rae*, 152; *Thomson*, 205-210; *Waddell*, 758; *Dean of Faculty*, 1310, 1311; *M'Neill*, 1452-1454; *Miller*, 2129; *G. J. Bell*, 2626; *Solicitor-General of Scotland*, 2815, 2816—Cause of consenting to the reduction in the number of lords ordinary in 1830, *Sir William Rae*, 156—The reduction to five was wrong, *Dean of Faculty*, 1310, 1311—The public service requires the number of lords ordinary rather to be increased than diminished, *Alexander*, 370—Opinion in favour of seven instead of five lords ordinary, *Dean of Faculty*, 1336-1341—The reduction of two lords ordinary has been too great; desirable to have an additional one appointed, *Hunter*, 1964. 2017.

See also *Appeals to the Court of Session. Arrears. Avisandum Causes. Choice of Lords Ordinary. Government. Inner House*, 1, 2, 5. *Judges of the Court of Session. Judges of the Inner House*, III. *Judgments*, 4. *Motion Roll and Motions. Parole Argument*, 4. *Petitions to the Inner House. Preparation of Causes. Reclaiming Notes. Reclaiming Petitions. Reserved Points. Routine Business. Session, Court of. Sittings of the Court. Teind Court. Vacations. Written or Printed Arguments or Cases.*

*Lushington, Dr.* Motion in committee for expunging part of the evidence of Mr. Darling, Ayes 7, Noes 1, *Proc. in Com.* p. xi.—For expunging a question put to Mr. Hope, Ayes 5, Noes 1, *ib.*—His amendment on Sir William Rae's motion for amending chairman's report, that words proposed to be left out stand part of question, Ayes 1, Noes 7, *ib.* xii.—His motion that the draft report submitted by the chairman and amended by the committee be adopted, agreed to, *ib.* xiii.

**M.**

*Mackintosh's Trustees against Hamilton and others.* Delay which arose in this case between the hearing in presence and the case being finally disposed of, *Hunter*, 2064.

*M'Neill, Duncan.* (Analysis of his Evidence.) Called to the Scotch bar in 1816, 1438, 1439—For a short time held the office of Solicitor-General, 1440—The intention of the Judicature Act, by substituting oral for written pleadings not carried out to the extent anticipated, 1442—Pleadings are fuller in the outer house than in the inner house, and causes, 1443-1445—Judges do not study their cases to an extent which makes them indifferent to the arguments of counsel, 1445-1449—One division could not do the business satisfactorily, 1450—A fewer number of judges than four would not be a good number for a court of review, 1451—Fewer than five lords ordinary would not be sufficient, even if the business were distributed, 1452-1454—To what extent it would be advantageous that the discussions in the inner house should be longer, 1455-1476—All changes in the mode of administering justice, though they may eventually produce good, are evils at the time, 1477-1480—Arrears before certain lords ordinary arise from the extent of business being such that they cannot overtake it, 1483-1484.

Advantage of the preparation of records remaining with the lord ordinary, but whose duties will be lighter as counsel get more expert, 1485-1498—There is no business performed by the inner house which might be transferred to the lord ordinary, 1499-1503—Inconveniences arising from the absence of counsel, but which is an evil that will cure itself, 1504-1509—Objections to a division of the bar, 1508-1513—Number of courts sitting at the same time, and extent to which the same counsel may be wanted before all, 1514-1520—Examination upon senior and junior counsel, and the number

**McNeill, Duncan.** (Analysis of his Evidence.)—continued.

of counsel allowed to speak in one cause, 1521-1530—Examination upon the ordering of cases; extent to which done; it ought only to be done in intricate cases; different description of circumstances under which they may be ordered, 1531-1553—It is difficult to mention any part of the pleadings that may not lead to controversy; and where that is the case, they should not be decided upon by any person but the judge, 1554-1558.

Examination as to what the record should contain as regards statements of law and facts, 1559-1571—Opinion in favour of parties having the choice of lord ordinary, and against the distribution of business among them, 1572-1578—There are advantages and disadvantages attending lord ordinary's notes, 1579-1582—Opinion that a judge cannot know too much of a case judicially; a suitor would be better pleased with an advocate's speech to a judge who did not know the facts, than to one who did, 1583-1588—In some cases the grounds of judgments are not stated sufficiently at length, but the evil is in a great degree cured, 1589-1592—It would not tend to the despatch of business or diminution of labour, if witnesses were examined *virâ voce* in court; further evidence upon *virâ voce* examinations, and by means of depositions, 1593-1602—Examination of witnesses before the sheriff's court; cases from thence may be appealed to the Court of Session; evidence sometimes taken in writing, in order to avoid jury trial, 1603-1605.

Practice of jury trial before sheriffs on assessing damages for canals, railroads, &c. under special statutes, 1606-1610—Opinion against sheriffs trying causes by jury trial, 1611—Jury trial has not succeeded as well as wished in civil cases, 1614—No dislike to jury trials in criminal cases, 1615, 1616—The district around Perth contains as large a number of well-informed inhabitants as any other rural district of Scotland, 1617, 1618—Grounds against civil causes being tried by sheriffs with the aid of a jury, 1619, 1620—Judges are appointed from among the sheriffs and the bar, 1621, 1622—The forms of trying criminal and civil cases with the aid of a jury, in Scotland, are materially different, 1623, 1624—Effect of increased sittings in reducing the arrears of the lords ordinary, and increasing those of the inner house, 1626-1629—The number of judges ought not to be diminished, but they might get through more causes, 1630—Considerable time taken up when the opinion of the whole court is taken on a question of importance, 1631-1636—Nature of cases that have left the Court of Session of late years, 1637-1641.

**Macqueen, Hugh.** Reference to his report before the Law Commission relative to the divisions' sittings on alternate days, *Miller*, 2406.

**Maritime Causes.** They have been transferred from the Court of Admiralty to local courts by Act of Parliament, *Miller*, 2243.

**Marriages.** In cases involving the validity of marriage the necessity for reading the papers would remain with the judge, *Stodart*, 1863.

**Mercantile Cases.** Mercantile and commercial cases have increased in the Court of Session of late years, *Thomson*, 264.

**Mercantile Law.** A great part of the law with regard to mercantile matters in Scotland is borrowed from the law of England, *Miller*, 2331-2350.

**Miller, William.** (Analysis of his Evidence.) Solicitor before the Supreme Courts, having a thorough acquaintance with the business since 1817, 2125-2127—In the outer house there is sufficient business for five judges, 2129—One inner division would be competent to do the business in the manner in which it is done at present, and to bestow more attention on it, 2130-2132—In the absence of a sufficient number of judges a lord ordinary is called in, 2134—Cases of interest or relationship in which judges are disqualified from sitting, 2135-2142—Opinion in favour of one inner house consisting of four judges, and that the delay of business arising from the absence of judges is not of frequent occurrence, 2133, 2134. 2143-2162—In which case it would be necessary that the sittings should be prolonged daily to five or six hours, 2163-2167.

Opinion in favour of judges not reading the records till after hearing the arguments of counsel, 2168-2178—There are great arrears before some of the lords ordinary, but there is great satisfaction when their judgments are obtained, and the arrears are not their fault, 2179-2183—Disadvantages arising in debates before the lords ordinary from the absence of counsel at other bars, 2183-2191—Great importance of a proper selection of counsel in the first instance; a greater demand for well-employed counsel would insure its own supply, 2192-2196—Reduction of the court would be more advantageous than confining the counsel to one court, 2197-2201.

The two inner houses are more likely to produce conflicting than unanimous judgments, and the more causes a court tries, the greater will be its experience, 2202-2214—Delays in the hearing of causes before Lords Moncrieff and Jeffrey arising from the absence of counsel, 2216-2219—Number of well-employed counsel, 2220—Number of

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*Miller, William.* (Analysis of his Evidence.)—continued.

of leading counsel, 2221-2223—Manner in which the alteration of the practice in 1825 has caused a monopoly of the talents of the bar, 2224-2225—Junior lord ordinary should prepare causes and dispose of the routine business, or it might be done at chambers, 2228-2232. 2353—One-half of the causes heard before the lords ordinary are finally decided by them, and the proportion is increasing, 2236—Number decided in the sheriffs' court, 2237—Decrease in the business in the Court of Session, and causes, 2241-2242—Dissatisfaction with regard to the Court of Session; causes thereof; it is increasing, 2248-2256.

Causes of the great confidence in the judgments of the House of Lords, 2257-2260—Lords ordinary are not chosen from caprice, but from the legal advisers' estimate of their abilities and care in the disposal of causes, 2262-2266—The public and the profession are satisfied with the way in which the system of *viva voce* pleading before the lord ordinary has been worked, 2267-2268—The dissatisfaction arises from the delay and expense in the preparation of causes, 2269-2272—Period which routine business occupies in the inner house, 2273-2277—That *viva voce* discussion has not been sufficiently carried into effect in the inner house is the opinion of the public, both branches of the profession and the bar, particularly the junior department, 2278-2292—Whether one court sitting five or six hours, and putting out double the number of causes, would be able to devote more time to *viva voce* hearing, 2293-2295.

Opinion that there is more delay now than there was prior to 1825, from the commencement of the suit to obtaining the judgment of the lord ordinary, 2229-2308—The opinion in favour of one inner house with four judges being sufficient, is founded on the length of time of public sitting of each division; the time that should be occupied by each judge in reading records, studying cases, and writing out opinions, must depend upon the importance of each case, 2309-2344—The bar and profession were on the increase, but have had a check, 2345-2349—Fewer tribunals sitting, and those not to admit of counsel leaving the bar during a debate, might prevent the inconvenience arising from the absence of counsel, the decrease of business in the outer house being made up by increase in the inner house, and increase of fees, 2357-2363—Impatience of judges in hearing arguments of counsel, partly arising from previous reading of the record; necessity for discretion in counsel, 2364-2376—Extent of jurisdiction of the sheriff's court, 2384-2387.

One judge attending to the preparation of causes and contested motions is better than a court of four for that purpose would be, 2390-2396—Objection to a proposal for having three courts sitting on alternate days, and to four judges for the preparation of causes, 2399-2406—Suggestion of a witness before the Law Commission for each of the inner houses to sit on alternate days, 2406—Another suggestion for the outer house and inner divisions sitting on alternate days, 2407, 2408—The present amount of business does not require the vacations to be shortened, 2409-2411—Want of uniformity in judgments from there being two houses, 2412-2414—The business of the courts might be advanced by something being done in vacation, 2417, 2418.

*Moncrieff, Lord.* See *Counsel*, 4.

*Motion Roll and Motions.* Time occupied by the court in, *Rep. v.*—Observations thereon, *Mr. Wallace's proposed Report, Proc. in Com. p. xv.*—Manner in which the motion roll before the lord ordinary might be disposed of by the clerk and agents, without the intervention of judge or counsel, except in cases of disagreement, *Alexander*, 449-473; *Stodart*, 1770, 1771—Extract from the evidence of Patrick Shaw to the same effect, *Evid. p. 77, ques. 966, App. p. 244*—Reference to Mr. Fisher's evidence before the Law Commission, on the delay arising by the lord ordinary's having to call over his motion roll, *Miller*, 2187—Relieving the judges from motions of course would cause a great saving of time, *Waddell*, 662-666; *Darling*, 954. 960, 961. 974, 975. 980-988. 1091; *Hunter*, 1954—Suggestions by Mr. G. J. Bell to the Law Commission for transferring unopposed motions to the clerk, *Miller*, 2184—Objections to motions of course being disposed of in the office, and not brought before a judge, *Dean of Faculty*, 1350-1360—State of the motion roll as called by each of the lords ordinary on the first day of the week of his being out, *App. p. 247*.

See also *Acts of Sederunt*, 2. *Inner House*, 4. *Routine Business*.

*Multiple-poiniding.* In processes of, of a very complicated nature, the agent is better informed of the circumstances than counsel, *Alexander*, 462.

## N.

*New Applications.* They are entered in the single bill roll in the first instance; the inner house should be relieved from the duty with regard to, *Hunter*, 1954.

*New Trials.* There is nothing in the Court of Justiciary in the nature of applications for new trials in the same manner as exists in the English law in cases of misdemeanors, *Lord Advocate*, 72.

## O.

*Oral Pleading.* See *Parole Argument*.

*Outer House*, Court of Session. Its constitution formerly and at present, *Lord Advocate*, 7-10—Course of proceeding in an action in the outer house, *Alexander*, 396-398—Stages of an ordinary action in the Court of Session till the decision of the lord ordinary is obtained, *App. p.* 243—Table showing the arrears of business in the Court of Session on 1st January 1832-1840, being causes in the outer house ready for debate but not heard, and cases at *Avisandum*, made up from annual returns to Parliament, *Darling*, 1161; *App. p.* 242—Tabular view of the business before the lords ordinary during the winter session 1839-1840, *App. p.* 247.

See also *Avisandum*. *Condescendence*. *Defences*. *Hearing in Presence*. *Lords Ordinary*, 2. 4. 6. *Parole Argument*, 4. *Preparation of Causes*. *Representation*. *Rolls of Causes*. *Session, Court of*, 2. *Sittings of the Courts*, 1. *Written or printed Arguments or Cases*.

## P.

*Parliamentary Qualification.* See *Qualification of Voters*.

**PAROLE ARGUMENT :**

1. *Extent of, previous to the Judicature Act.*
2. *How far the Act has been complied with.*
3. *Necessity for a greater length of hearing in the Inner House.*
4. *Comparison with hearings in the Outer House.*
5. *Extent to which Counsel are or can be heard.*

1. *Extent of, previous to the Judicature Act.*

Details of the evils resulting from written or printed pleadings; advantages of parole pleading introduced by 6 Geo. 4, c. 120, and necessity for its further extension, *Rep. iv.*; *Lord Advocate*, 14-20—Whether the change from written to oral pleadings could have taken place without an Act of Parliament, *Thomson*, 330, 331—Additional statements were sometimes made to the inner house, but they were considered to have little effect, it being supposed that the judges had previously made up their minds upon the written evidence, *Rep. vii.*; *Lord Advocate*, 18, 19; *Dean of Faculty*, 1266.

2. *How far the Act has been complied with.*

How far the Act 6 Geo. 4, c. 120, substituted oral pleading for written arguments, *Sir William Rae*, 144—The Act of 1825, as regards parole pleading, has not been carried out as far as was intended, *Rep. vi.*; *Lord Advocate*, 31; *Thomson*, 192, 193; *M'Neill*, 1442; *G. J. Bell*, 2590; *Solicitor-General of Scotland*, 2811-2813—Within the last five or six years oral argument has been carried to the extent wished for under the Act, *Dean of Faculty*, 1264, 1265—That *vivâ voce* discussion has not been sufficiently carried into effect in the inner house is the opinion of the public, both branches of the profession, and the bar, particularly the junior department, *Miller*, 2278-2292; *Hunter*, 2035—From the short manner in which arguments are conducted, the public, nor even professional men who are not in the cause, cannot in many cases understand the point the court has to decide, *R. Bell*, 2481-2485—Proportion of cases so circumstanced, *R. Bell*, 2503-2509—As the old judges are replaced, the evil will work its own cure, *Sir William Rae*, 157, 158; *Thomson*, 197; *Waddell*, 754-756; *R. Bell*, 2448-2450—Opinion that the appointment of new judges in the inner house would not of itself be sufficient to improve the system of hearing causes therein, *Alexander*, 489, 490.

3. *Necessity for greater length of hearing in the Inner House.*

A greater length of time in hearing would give greater satisfaction to the profession and the public, and remove certain imputations from the judges, *Lord Advocate*, 130; *Thomson*, 214, 215. 303-307. 317-320; *Alexander*, 534-551; *Waddell*, 656, 657. 754-756; *M'Neill*, 1455-1476; *Stodart*, 1795-1803; *Solicitor-General of Scotland*, 2811-2813—It would correct any misapprehension of the judges, *Waddell*, 656, 657—It is very essential for the administration of justice in Scotland, and its due character, that full *vivâ voce* discussion should be introduced, *G. J. Bell*, 2596-2601.

4. *Comparison with hearings in the Outer House.*

Satisfaction at the fullness of the debates before the lord ordinary, *Rep. v.*; *Lord Advocate*, 32; *Dean of Faculty*, 1333; *Stodart*, 1795-1803; *Miller*, 2267-2268; *R. Bell*, 2433, 2434—Objections to its being conducted at intervals, *Dean of Faculty*, 1333; *Stodart*, 1769—Suggestions by Mr. G. G. Bell before the Law Commission for shortening the discussions of counsel before the outer house, *Miller*, 2184—Cause of there not having been the same fullness of discussion in the inner house that has taken place in the outer house, *Rep. v.*; *Lord Advocate*, 32-34; *Alexander*, 42; *M'Neill*, 1443-1445; *R. Bell*, 2437-2443—Comparative time the debates of counsel last in the outer house and in the inner house, *Alexander*, 415-418—If cases were opened by counsel in the inner house as fully as they are in the outer house, the present dissatisfaction would entirely disappear, *G. J. Bell*, 2588-2590—There is greater propriety

**PAROLE ARGUMENT:—4. Comparison with hearings in the Outer House—continued.**

propriety and necessity for an argument in the inner house than in the outer house, *Alexander*, 421—Necessity for as full *vivâ voce* pleading in the inner house as there is in the outer house and before the House of Lords, *Solicitor-General of Scotland*, 2804, 2805—As long a discussion is not wanted in the inner as the outer house, but great improvement has taken place therein since 1833, *Rep.* viii.; *Dean of Faculty*, 1834.

**5. Extent to which Counsel are or can be heard.**

Every counsel of eminence at the bar, and entitled to weight, can, by his statement that the case is one of extreme importance and difficulty, command a full hearing, *Lord Advocate*, 44—At present the case is opened to any extent the counsel choose, *Dean of Faculty*, 1266—Extent to which counsel are and should be heard, *Waddell*, 843–851—Want of a satisfactory hearing may in some cases be attributable to the tediousness of counsel; number of counsel usually heard, *Lord Advocate*, 112–114; *Thomson*, 192, 193; *Darling*, 1146–1151—The pleadings of counsel in the inner house may get to greater lengths, but whether that will be advantageous is problematical, *Dean of Faculty*, 1648, 1649.

See also *Counsel. Hearing in Presence. Inner House*, 5. *Judges of the Inner House*, iv., 4. 6. *Session, Court of. Sittings of the Courts*, 2.

*Permanent Lords Ordinary.* See *Lords Ordinary*, 1.

*Personal Diligence.* See *Diligence. Process. Inhibition and Arrestment.*

*Perth, County of.* Is one of the most extensive jurisdictions any sheriff possesses in Scotland, *M'Neill*, 1482—The district around Perth contains as large a number of well-informed inhabitants as any other rural district of Scotland, *M'Neill*, 1617, 1618.

*Petitions to the Inner House.* After judgment by the lord ordinary, parties might formerly have gone on petitioning the inner house till the judges had pronounced two consecutive judgments agreeing, *Lord Advocate*, 18, 19—Which practice has been very properly done away with by Act 6 Geo. 4, c. 120, *ib.*—The inner house possess original jurisdiction with regard to, *Waddell*, 625.

See also *Reclaiming Petitions.*

*Pleadings.* See *Acts of Sederunt. Condescendence. Defences. Facts. Judicature Act. Litigation. Lords Ordinary. Parole Argument. Points of Form. Preparation of Causes. Printing Proceedings. Record. Representations. Summons. Written Arguments.*

*Pleas of Guilty.* The number of pleas of guilty are not very numerous, *Lord Advocate*, 70—Increase in the number of those who plead guilty, *Solicitor-General of Scotland*, 2895, 2896.

See also *Capital Punishment.*

*Poindings.* See *Inhibition and Arrestment.*

*Points of Form.* Number of questions that have arisen since 1825 on points of form; supposed expense of each; total amount and evils of its falling on suitors; *Darling*, 1034–1042; *Dean of Faculty*, 1652; *Solicitor-General of Scotland*, 2856, 2857—The settlement of certain points under the Judicature Act may relieve the business of the courts, but new points are constantly arising on late Acts of Parliament, *Darling*, 1039—The new system of 1825 gave rise to much litigation relative to, but which evil will in time correct itself, *Dean of Faculty*, 1259, 1652; *Hunter*, 2043, 2044; *G. J. Bell*, 2733—Manner in which they have led to a decrease in the business of the Court of Session, *Stodart*, 1670—It would be a saving of time if the judges were relieved from such innumerable questions thereon, *G. J. Bell*, 2739—The court has not suggested to Parliament any proposal for doing away with doubtful points, *Solicitor-General of Scotland*, 2852–2854.

See also *Inhibition and Arrestment. Suitors.*

*Points of Law.* If the opinion of the whole of the judges could be taken upon abstract points of law, it would be advantageous, *Hunter*, 2116, 2117.

See also *Reserved Points. Suitors.*

**PREPARATION OF CAUSES:**

1. *Generally, and delay and expense therein.*
2. *Manner in which attended to by the Lords Ordinary.*
3. *Opinions for and against relieving them from the duty.*

**1. Generally, and delay and expense therein.**

The preliminary preparation has always been the course of law in Scotland, which system existed before 1808, and nothing could be satisfactorily substituted for, *Rep.* iii.

*Lord Advocate*, 75–77—Observations thereon, *Mr. Wallace's proposed Report, Proc.* 0.45. in



**PREPARATION OF CAUSES:—1. Generally, and delay and expense therein—continued.**

*in Com. p. xv.*—No change has been made in the last 40 years interfering with preparation being left to a single judge, *Rep. iii.*—Object of the Judicature Act in binding parties down to their statements of facts, *Rep. iv.*—Superintendence of, should not be withdrawn from the judge, *Rep. v.*—Extract from page 39 of first Report from Law Commissioners, Scotland, *App. p. 243*—Great improvements may be made in the mode of making up the records, but which will not lighten the duties of the lord ordinary, *Dean of Faculty*, 1429, 1430. 1647—Reference to the evidence given in 1824 as to the preparation of records, similar opinions being still retained, *Dean of Faculty*, 1433–1435—Reference to the evidence of Mr. Fisher before the Law Commission on the delay in the preparation of the case, occasioned by the numerous divisions of the condescendence and answers, *Miller*, 2187—Dissatisfaction arises from the delay and expense in the preparation of causes, *Miller*, 2269–2272—Complaints are made about the mode of preparing causes before the lords ordinary, *R. Bell*, 2456.

Defect in the preparation of causes partly attributable to the strictness of the Judicature Act, *G. J. Bell*, 2629–2633—Objection to the frequent revisal of condescendence and answers; it should be imperative to close the record, according to the judgment of the person appointed to superintend it, *G. J. Bell*, 2728–2730—Judges ought to have the power of compelling the closing the record, *G. J. Bell*, 2778–2781—Causes of complaint with regard to, are gradually diminishing, *Solicitor-General of Scotland*, 2793—Condescendence and answers are prepared sometimes partly with a view to a fuller hearing in the inner house, and sometimes to avoid getting into the jury court, *Solicitor-General of Scotland*, 2825, 2826.

**2. Manner in which attended to by the Lords Ordinary.**

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## SESSION, COURT OF:

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2. *Building Accommodation.*
3. *Dissatisfaction at the mode of conducting Business, Delay and Expense.*
4. *Increase or Diminution and Importance of Business.*
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#### SITTINGS OF THE COURT:

1. *Extent of Sittings formerly and at present.*
2. *Necessity for prolonged Sittings, and effect of them.*
3. *Evils of the several Courts sitting at the same time, and remedies suggested.*

##### 1. *Extent of Sittings formerly and at present.*

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3. *Evils of the several Courts sitting at the same time, and remedies suggested.*

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*Skene, Mr.* His concurrence in the opinion of the Dean of Faculty before the Commission in 1834, that the judges should have nothing to read before hearing the cause, *G. J. Bell*, 2608.

*Small Debt Courts.* The Court of Session exercises a jurisdiction of review in cases of small debts, *Rep. iii.*; *Lord Advocate*, 6—Extent to which the Small Debt Court and Circuit Small Debt Court has lessened the business of the Court of Session, *Waddell*, 654; *Darling*, 907—Extent of jurisdiction therein, *Miller*, 2387, 2389.

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*Special Cases.* They have been used but seldom, and only on jury trials, *G. J. Bell*, 2695, 2696.

*Stodart, John Riddle.* (Analysis of his Evidence.) Writer to the signet for 24 years, 1663, 1664—Statement from returns of the extent of decrease in the business of the Court of Session since 1831, 1666-1669—Causes assigned for such decrease, 1670-1672—Causes of dissatisfaction by suitors, 1672-1678—Opinion in favour of striking off one division, leaving the other division to consist of four judges, and the outer house of five lords ordinary, as at present, 1679-1682—Reasons for giving a preference to four judges, 1683, 1684—Nature of the delay and inconvenience arising from one division having to take the opinion of the other, or of the whole court, 1684-1704—Further evidence in favour of there being only one division, 1705-1710.

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*Tenants' Possessions.* The Court of Session in 1756 altered the law with regard to the removal of tenants from their possessions by an act of sederunt, *Darling*, 1059-1064.

*Tenor.* Manner in which the inner house should be relieved from processes proving the tenor, *Hunter*, 1954.

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U.

## U.

*Uniformity of Decision.* See *House of Lords. Inner House, 4. Judges of the Inner House. Judgments. Routine Business.*

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*Writers to the Signet.* Minutes of a meeting of writers to the signet, to protest against the reduction of the number of judges, showing the increase of the practice of hearings in presence, *Hunter*, 2074-2079—Resolutions passed at a meeting of the society of writers to Her Majesty's signet, held at Edinburgh 6 February 1840, *App.* p. 244.

See also *Acts of Sederunt*, 1.

Written

**Written or Printed Arguments or "Cases."** Description of minutes of debate or cases which are sometimes ordered, *Waddell*, 611-625; *G. J. Bell*, 2614-2617.—Observations thereon, *Mr. Wallace's proposed Report, Proc. in Com. p. xvi.*—Previous to 1825, cases came into the inner house against the judgments of the outer house, on full printed arguments, which it was the intention of the Judicature Act to abolish, *Rep. v.*; *G. J. Bell*, 2636; *Solicitor-General of Scotland*, 2788-2790.—Power reserved to the judges under Act 6 Geo. 4, c. 120, to order a written argument in particular cases, *Lord Advocate*, 18-20.—The ordering written cases must be left in the discretion of the judges, *Lord Advocate*, 106-114.

They have been too frequently ordered in the outer house since the Act 6 Geo. 4, c. 120, *Lord Advocate*, 31; *Stodart*, 1735-1738.—They are not ordered more frequently than is necessary, considering the importance and difficulty of the particular cases, *Sir William Rae*, 146.—It is only in matters of great difficulty and importance, and in cases of new matter not on the record, that they are ordered, and are more frequently required, by the inner than the outer house, *Thomson*, 189, 190. 277-280; *Waddell*, 618-625.—It ought only to be done in intricate cases; different description of circumstances under which they may be ordered, *M'Neill*, 1531-1553.—The costs of cases are taxed against the losing party, *Stodart*, 1739-1741.

Practice of parties to apply to the lord ordinary for printed cases in order to insure a full argument in the inner house, *Lord Advocate*, 46-49; *Miller*, 2291; *Solicitor-General of Scotland*, 2827.—Comparison between the inner house and the outer house, as regards the practice of ordering written cases since the Act of 1825, *Lord Advocate*, 42-44.—The proportion of cases is very small which now go into the house upon printed arguments, *Thomson*, 189. 277. 347-351; *Dean of Faculty*, 1266.

In the inner house, with respect to many judges, there is a great advantage in having written arguments, *Lord Advocate*, 52.—A printed argument is a very deliberate and useful mode of assisting the judges in the consideration of weighty cases, and the practice has been reduced to an extent beyond expedience, *Dean of Faculty*, 1265.—Diminution in the number of printed cases; evils of such diminution; great value of such cases to Scotch litigants; *Dean of Faculty*, 1370-1375.—Necessity for a written or printed argument in cases of appeals to the House of Lords, *M'Neill*, 1539, 1540.

**Writs.** The *inducia* or period between the service of the writ and the time it is called in court is too long, but cannot be altered without an Act of Parliament, *Darling*, 950-952.

See also *Signet. Summons.*

**Writs of Error.** An account of the number of writs of error presented, non-prossed, heard and decided on in each session, from 14 March 1823 to 13 June 1836, distinguishing the number of Scotch, English and Irish in each session respectively, *Mr. Wallace's proposed Report, Proc. in Com. p. xix.*; *App. p. 246.*





# **R E P O R T**

FROM

**SELECT COMMITTEE**

ON THE

**O F F I C E**

OF

**CORONER FOR MIDDLESEX;**

*WITH THE*

**MINUTES OF EVIDENCE,**

**APPENDIX, AND INDEX.**

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*Ordered, by The House of Commons, to be Printed,  
27 July 1840.*

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*Martis, 17° die Martii, 1840.*

*Ordered, THAT* a Select Committee be appointed to inquire into any Measures which have been adopted for carrying into effect, in the County of Middlesex, the Provisions of the Act 1 Victoria, c. 68, and also into any Proceedings of the Justices of the Peace in relation to the Office of Coroner in the said County.

*Lunæ, 23° die Martii, 1840.*

And a Committee is nominated of—

Mr. Wakley.	Sir James Duke.
Colonel Thomas Wood.	Lord Eliot.
Mr. William Williams.	Mr. Aglionby.
Mr. Mackinnon.	Sir Thomas Fremantle.
Mr. Solicitor General for Ireland.	Sir Benjamin Hall.
Mr. Cripps.	Mr. Gally Knight.
Mr. Thomas Duncombe.	Sir George Strickland.
Lord Teignmouth.	

*Ordered, THAT* the Committee have Power to send for Persons, Papers and Records ; and that Five be the Quorum of the Committee.

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## R E P O R T.

**THE SELECT COMMITTEE** appointed to inquire into any Measures which have been adopted for carrying into effect, in the County of **MIDDLESEX**, the Provisions of the Act 1 **VICTORIA**, c. 68, and also into any Proceedings of the Justices of the Peace in relation to the **OFFICE** of **CORONER** in the said County; and who were empowered to report their **OPINION** thereupon, together with the **MINUTES** of **EVIDENCE** taken before them, to **The House**;—**HAVE** considered the Matters to them referred, and have agreed to the following **RESOLUTIONS**:—

*Resolved,—*

1.—**THAT** the two Schedules of Fees, Allowances and Disbursements, to be paid by the Coroners, framed in pursuance of the Act 1 **Victoria**, c. 68, by the Justices of Peace of the county of **Middlesex**, are in conformity with the provisions of the said Act.

2.—**THAT** with respect to the prohibition contained in the amended Schedule of the allowance of fees and expenses to “domestic servants, constables in the Metropolitan Police force and parochial constables, or officers receiving regular salaries or wages,” and the prohibition, in the “order” subsequently issued, of such payments to “constables where there is a salaried constable in the parish,” the Committee are of opinion that the parochial constables have been subjected by such regulations to occasional expenses for which the salary received by them from their parishes does not make adequate provision, and that considerable discouragement to the discharge of their duty in regard to inquests has resulted. It appears that in Mr. Baker’s district, owing to his construction of the import of the above regulations, they have been inoperative. The Committee must also observe, that according to the Returns submitted to them, the restriction in question exists only in **Middlesex**.

3.—**THAT** the Magistrates in Quarter Sessions assembled are authorized by the Act 25 **Geo. II.**, c. 29, to pay the Coroners for all inquests which are “duly” taken. At the same time the Committee are of opinion, that so much uncertainty remains attached to the interpretation of the term “duly,” especially since the decision in the case of **East**, that in their judgment a clearer exposition of the term is desirable.

4.—**THAT** the Magistrates, in summoning the Coroners on the auditing of their accounts, appear to have erred, in one instance, by exercising such powers in committee whilst it belonged exclusively to the general court.

5.—**THAT** the Magistrates deriving from the Act 1 **Vict.** chap. 68, the discretionary power of administering in general court an oath to the Coroners, as to the correctness of their accounts of the sums disbursed by them, under the provisions of the aforesaid Act, do not appear to have exceeded their power; and that the practice has not in any degree reflected on the character of the Coroners.

6.—**THAT** the Magistrates, in the exercise of their jurisdiction as Visiting Justices of the County Lunatic Asylum, have adopted resolutions, of which the object is to assist the Coroner in the discharge of his duties with regard to inquests held in the establishment subject to their supervision.

7.—THAT the Magistrates, in disallowing the fees on inquests held by deputy, acted in conformity to the law; but that Mr. Wakley, in employing a deputy during his temporary illness, had followed the uninterrupted practice of his predecessors: and that with respect to Deputy Coroners, it appears that by the 6 & 7 Will. IV., c. 105, the Coroners of cities and boroughs, in cases of illness and unavoidable absence, are empowered to appoint deputies.

8.—THAT with reference to an inquest held at Hayes, the proceedings of the Magistrates, in committing an individual to Newgate, on a charge of manslaughter, after the jury at the inquest had found a verdict of wilful murder, were strictly legal.

9.—THAT in reference to another inquest, the Coroner having committed an individual to Newgate, and it having been alleged that the Magistrates had censured the Coroner and severely rebuked the constable for surrendering the said individual on the Coroner's warrant, the Committee having no distinct proof of the terms or form of such censure, abstain from expressing any opinion thereupon.

10.—THAT it appears to the Committee, that any undue interference with the Coroners' jurisdiction, which may have been displayed by individual Magistrates, has been over-ruled by the decision of the general court, and that the Magistrates, as a body, have borne testimony to the merits, and manifested a disposition to uphold the authority, of the Coroners.

11.—THAT the Committee do not conceive themselves authorized by the terms of the reference originating their proceedings, to offer any opinion on the general subject of the office of Coroner.

27 July 1840.

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 PROCEEDINGS OF THE COMMITTEE.
 

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*Martis, 26<sup>o</sup> die Maii, 1840.*

## PRESENT :

Lord Teignmouth.  
Mr. Wakley.  
Colonel Thomas Wood.

Mr. Thomas Duncombe.  
Sir George Strickland.  
Sir B. Hall.

*Jovis, 23<sup>o</sup> die Julii, 1840.*

Motion made (by Mr. Duncombe), and Question proposed,—

The Committee, in pursuance of the directions of The House, have examined several witnesses, “as to any measures which have been adopted for carrying into effect, in the county of Middlesex, the provisions of the Act 1 Vict. c. 68, and also into any proceedings of the justices of the peace in relation to the office of Coroner in the said county,”—and have agreed to lay before The House the evidence they have received.

Amendment proposed (by Mr. Aglionby), at the end of the question to add—“together with their Opinion thereon.”

Question put,—

That those words be there added.

Ayes, 4.  
Mr. Aglionby.  
Lord Eliot.  
Mr. Wakley.  
Mr. Williams.

Noes, 3.  
Colonel Thomas Wood.  
Mr. Gally Knight.  
Mr. Duncombe.

Words added.

Question, as amended, put.

Ayes, 4.  
Mr. Aglionby.  
Lord Eliot.  
Mr. Wakley.  
Mr. Williams.

Noes, 3.  
Colonel Thomas Wood.  
Mr. Gally Knight.  
Mr. Duncombe.

Resolution, No. 1, proposed (by the Chairman)—

“That the two Schedules of fees, allowances and disbursements, to be paid by the Coroners, framed in pursuance of the Act 1 Vict., c. 68, by the justices of the peace of the county of Middlesex, and the order relative to the same subsequently issued by them, are in conformity to the provisions of the said Act.”

Proposed by Mr. Wakley to amend the question in the following manner :—

“That the first Schedule of fees, allowances and disbursements to be paid by the Coroner, was framed pursuant to the Act 1 Vict., c. 68, and was in conformity with the provisions of the said Act.”

Question put,—

That “first,” be inserted after the word “the” in the proposed question.

Ayes, 3.  
Mr. Aglionby.  
Mr. Williams.  
Mr. Wakley.

Noes, 4.  
Lord Eliot.  
Colonel Thomas Wood.  
Mr. Mackinnon.  
Mr. Gally Knight.

Amendment proposed (Mr. Aglionby),—

To leave out “and the order relative to the same subsequently issued by them.”

Question put,—

“That the words proposed to be left out stand part of the Question.”

Ayes, 2.  
Colonel Thomas Wood.  
Mr. Mackinnon.

Noes, 5.  
Lord Eliot.  
Mr. Aglionby.  
Mr. Knight.  
Mr. Wakley.  
Mr. Williams.

Question, as amended, “That the two Schedules of fees, allowances and disbursements, to be paid by the Coroners, framed in pursuance of the Act 1 Vict., c. 68, by the justices of the peace of the county of Middlesex, are in conformity to the provisions of the said Act,” put,—

Ayes, 3.  
Colonel Thomas Wood.  
Mr. Gally Knight.  
Mr. Mackinnon.

Noes, 3.  
Lord Eliot.  
Mr. Wakley.  
Mr. Williams.

The Chairman declared himself with the Ayes.

PROCEEDINGS OF THE COMMITTEE—*continued.**Sabbati, 24<sup>o</sup> die Julii, 1840.*

PRESENT:

Lord TEIGNMOUTH, in the Chair.

Lord Eliot.  
Mr. Wakley.  
Colonel T. Wood.

Mr. Gally Knight.  
Mr. Mackinnon.  
Mr. Duncombe.

Resolution No. 4, proposed by the Chairman.

Question put,—

“That the Magistrates, in summoning the Coroners on the auditing of their accounts, appear to have erred in one instance by exercising such powers in Committee, whilst it belonged exclusively to the general Court.”

Ayes, 3.  
Lord Eliot.  
Mr. Gally Knight.  
Mr. Wakley.

Noes, 1.  
Colonel T. Wood.

Motion made (Mr. Wakley), and Question put,—

“That it appears by the evidence which has been taken before this Committee,—

Questions 12, *et*  
*seq.* 1088. 1315.

“That since the enactment of the 25th George II., c. 29, down to the month of January 1839, the Fees allowed by that Statute on the holding of Coroners’ inquests and for mileage were paid, in the county of Middlesex, by the Justices of the Peace, out of the county rates.

Ques. 15, *et seq.*  
1088.

“That during the same lengthened period, the other expenses connected with inquests, such as the payments to constables, witnesses and jurymen, were discharged out of the poor-rates by the overseers of the several parishes wherein the inquests were held.

Ques. 20, *et seq.*  
1430.

“That in consequence of the enactment of the 6th & 7th William IV., c. 74, the payments thus made out of the poor-rates were declared, in a circular issued by the Poor Law Commissioners in March 1837, to be illegal, and were directed to be disallowed in the accounts of the parochial officers.

Ques. 4 and 25, *et*  
*seq.* 241. 1097.  
1315. 1419. 1541.  
1714.

“That the duties of the Coroners’ office having been thrown into a state of considerable difficulty and embarrassment by this sudden alteration of an ancient custom, the Act 1st Victoria, c. 68, intituled, “An Act to provide for the payment of Expenses of holding Coroners’ Inquests,” was passed, in the preamble of which Act it is declared, ‘that the holding of Coroner’s inquests on dead bodies is attended with divers necessary expenses, for the payment whereof no certain provision is made by law, and such expenses have usually been discharged, without any lawful authority for that purpose, out of the monies levied for the relief of the poor, and it is expedient to make adequate legal provision for the payment of such expenses.’

Ques. 28, *et seq.*  
530. 1056. 1097.  
1316. 1355. 1714.

“That this statute provided that the magistrates of every county in England and Wales, in general quarter sessions assembled, should at the general quarter sessions of the peace, prepare a schedule of fees, allowances and disbursements which might be lawfully paid by every Coroner on the holding of any inquest on any dead body within such county, other than the fees payable to medical witnesses.

Ques. 34.

“That the law having thus provided that the expenses connected with the holding of inquests which had hitherto been discharged out of the poor-rates, should henceforth be paid out of the county rates, the Justices of the Peace for the county of Middlesex assembled at a general quarter sessions in November 1837, and prepared a schedule of the fees, allowances and disbursements to be paid at inquests by the Coroners for that county, according to the provisions of the said Act.

Ques. 35, *et seq.*  
141. 203. 243.

“That it appears to this Committee that the schedule so prepared was a just and reasonable one; and from the evidence which Your Committee has received, it has been shown to have operated with perfect satisfaction as regarded the Coroners, constables and witnesses; the jurymen alone having expressed dissatisfaction therewith, on the ground that no allowance had been made in it, to them, for their loss of time in attending at inquests.

Ques. 775. 1139.

“That in January 1839 a vacancy occurred in the office of Coroner for the county of Middlesex, by the decease of Thomas Stirling, Esq., who had occupied the office 23 years.

Ques. 673, *et seq.*  
777. 1172. 1003.

“That whilst the election of a successor to the vacant office was pending, after the precept of the Chancellor had been issued, and the day for the election appointed, the Justices of the Peace, in a memorial presented to them by certain freeholders of the county, presented a petition to the Lord Chancellor, praying that a precept might be issued for the election of a third Coroner in the county, on the ground that the great increase in the number of inquests rendered such an appointment necessary.

Ques. 1139.

“That the Lord Chancellor having declined to interfere on that occasion, the election of a successor to Mr. Stirling was concluded on the 25th of February 1839.

Ques. 1144, *et seq.*  
1631.

“That within a few days after his election, Mr. Wakley, the newly chosen Coroner, held an inquest at Hayes on the body of a gentleman who had been stabbed. That the inquest lasted during two entire days; and that the jury, having for its foreman the churchwarden of the



PROCEEDINGS OF THE COMMITTEE—*continued.*

the parish, and consisting of the yeomen and gentry of the neighbourhood, including amongst their number a barrister and also a highly respectable solicitor, having returned a verdict of wilful murder, a warrant, exhibiting upon its face the verdict of the jury, was issued against the accused party. That this warrant was prepared by the clerk of Mr. Wakley, a person who had acted in that capacity to Mr. Stirling for the 15 preceding years. That notwithstanding the finding of the jury, three of the Justices of the Peace, acting in the Uxbridge division, re-opened the inquiry, and committed the accused party to Newgate, on the charge of manslaughter only.

"That although the magistrates acted legally in instituting the second inquiry, their proceedings entailed upon the county an additional expense of £.53. 15s.; the total amount of the disbursements at the two days' inquiry before the Coroner having been £.6. 7s.

Ques. 1149-50.

"That soon afterwards, in another case of death by stabbing, the accused person having been, in the first instance, taken before the Justices of the Peace, and then produced at the inquest at Harefield, he was committed by the Coroner, for trial, on the jury having returned a verdict of wilful murder against him.

Ques. 1151, *et seq.* 1507.

"That in thus committing the accused person for trial on the finding of the jury, it appears to this Committee, that the Coroner did no more than comply with the provisions of the 4th of Edward I., which enacts that 'how many soever be found culpable in any of the manners aforesaid, they shall be taken and delivered to the sheriff, and shall be committed to the gaol.'

Ques. 1508.

"That this proceeding on the part of the Coroner, although strictly legal, appears to have given offence to the Justices of the Peace acting in the Uxbridge division of the county.

Ques. 1151. 1507.

"That in the month of October following, the Coroner who had presided on the preceding occasions held two inquests in the parish of Hendon, which gave rise to some proceedings on the part of the Justices of the Peace. That in the first of those cases it was proved that a boy named Coleman had lost his life by an accidental wound inflicted in the foot. That in the second case a man named Austin, an aged pauper, died in the Union workhouse, in consequence of having fallen into a copper of boiling water in that establishment.

Ques. 422. 474.

649. 923. 983. 1531.

"That the rector of the parish of Hendon, having been the Chairman of the board of guardians for the Union, and also a Justice of the Peace for the county, denied the 'necessity' of an inquest on the body of Austin, and having refused to obey the warrant for the disinterment of the body, the Coroner, on the assembling of the jury for the third time, was obliged to issue another warrant to the constable and his assistants, in order to effect the disinterment, and obtain for the jury a legal view of the body.

Ques. 427. 983, *et seq.* 1154.

"That in the same month of October, the rector of Hendon, availing himself of his position as a Justice of the Peace, complained, in strong terms, of the proceedings of the Coroner, before the bench of magistrates at the general quarter sessions. At the same time another magistrate moved that the accounts of the Coroner should be referred back to the committee of accounts, 'in consequence of their not having been accompanied by sufficient vouchers;' and a motion was also made for the appointment of a committee to inquire into the causes of the increase of inquests in the county. Both of those motions were carried without a division.

Ques. 174. 179.

445. 462. 621. 667.

768. 794-5. 1154.

1158. 1181. 1413.

1535.

"That the Coroners were requested, by notes, to attend before both committees. Having attended, the Coroner for the western division of the county delivered in a written protest, denying the right of the committee to question him on any subject connected with his office; this protest having been entered on the Minutes, he then consented to answer any interrogatories that might be proposed to him, and both of the Coroners gave all the explanations which were demanded.

Ques. 166. 260.

462. 474. 660.

1414.

"That the committee of accounts, after several meetings, concluded their proceedings by recommending the court to disallow the fees and charges of the Coroner for the inquest which had been held on the body of the boy, Henry Coleman, at Hendon, and the special committee presented a report to the general court, in which they attributed the increase of inquests to the three following causes:—

Ques. 81. 424. 649. 1161.

"The Registration of Deaths.

"The payment of medical witnesses under the provisions of 6th & 7th Will. IV., c. 89.

"The fees paid to constables.

"That the special committee, in the progress of its inquiry, selected 48 cases of inquests on which they required explanations from the Coroners, relating to the 'necessity' of holding such inquests.

Ques. 178. 252.

"That the only inquest of the 48 which was disallowed, was the inquest on the body of Coleman, and, finally, the resolution for disallowing that inquest was *rescinded* by the general court, and the whole of the charges paid.

Ques. 308. 424.

462. 482. 503.

"That it was proved before both committees of the Justices, and also before this Committee, that at the time when those inquiries were instituted, the number of inquests taken by Mr. Wakley in the seven months during which he had held office, was less than the number which had been taken by Mr. Stirling in the corresponding months of the preceding year.

Ques. 767. 1449.

"That the right of the Justices of the Peace to institute a strict inquiry whilst auditing the accounts of the Coroners is fully admitted by this Committee.

549.

a 4

" That

## PROCEEDINGS OF THE COMMITTEE—continued.

Ques. 174. 178.  
186. 382. 1556.

"That it does not appear, by the Minutes kept at the Sessions House, which were produced to this Committee by the Deputy Clerk of the Peace, that any proceedings had been adopted by the magistrates in relation to the office of Coroner, until the vacancy was caused by the death of Mr. Stirling in January 1839.

Ques. 668. 700.  
1143. 1452.

"That the accounts of Mr. Wakley, and the charges made therein, had been prepared and delivered in exact conformity with the usage which had been observed during the preceding 15 years in the accounts of Mr. Stirling; and it appears that the charges were of the same kind, in all respects, in both sets of accounts.

Ques. 176. 186.  
498. 646. 660. 763.  
1454. 1713.

"That while the clerk sent in such accounts for Mr. Stirling, it appears that no complaints arose, no deductions were made; but that when similar accounts were delivered at the Sessions House on behalf of the successor of Mr. Stirling, although a less number of inquests had been held, the 'necessity' for taking many of them was denied, some trifling items for 'mileage' were struck out as 'overcharges,' and new rules for charging the 'mileage' were made and enforced.

Ques. 659. 671.  
710. 757. 1010.  
1402. 1474. 1551.  
1711.

"The Justices of the Peace having received information that Mr. Wakley had held some inquests by deputy, and it having been proved, by the statements of Mr. Wakley before the court, that 20 inquests had been held by deputy, when he was confined to his house on one occasion by illness, that the fees, and also the monies which had been paid out of pocket by the Coroner to constables and witnesses, amounting to £.40. 9., were struck out of his account.

Ques. 606. 710.  
735. 1012. 1477.  
1551.

"That it appears that in holding those inquests by deputy, Mr. Wakley had followed the examples of his predecessors in both of the divisions of the county; it was proved by the evidence of Deverell, the constable of Shadwell, that the predecessor of Mr. Baker scarcely held six inquests in a year, excepting by deputy; and that in the House of Correction and the New Prison, Clerkenwell, where the Visiting Justices were almost constantly in attendance, the deputy of the Coroner acted instead of the Coroner himself on nearly all occasions.

Ques. 416. 511.  
621. 682. 701. 746.  
1179.

"That it does not appear, from the Minutes kept at the Sessions House, that any deductions had ever been made from any of the Coroners' accounts similar to the deductions which were made by the magistrates in the accounts of the successor of Mr. Stirling.

Ques. 1406. 1569.

"That it does not appear that Mr. Wakley had received any intimation from the magistrates that they had any objection to his holding inquests by deputy, until he was informed that the sum before stated was to be deducted from his account.

Ques. 190. 200.  
290. 1398.

"That with respect to deputy coroners, it appears that such officers may be appointed in particular liberties and franchises, and that the Coroners of cities and boroughs are empowered, in certain cases, to appoint deputies, by the recent Act of the 6 & 7 William IV.

Ques. 81. 67. 71.  
126. 147.

"That the Special Committee of Magistrates appointed to inquire into the 'causes' of the increase of inquests, having reported that one of those causes was to be found in the allowance which had been made to 'constables' in the Schedule framed under the provisions of the Act of Victoria, a new Schedule was almost immediately prepared, in which it was provided that 'no payments were to be made to parochial constables or officers receiving regular salaries or wages;' and, subsequently, an 'Order' was issued by the Court, dated the 16th of January 1840, declaring that 'no payment should be allowed to constables when there is a salaried constable in the parish.'

"That this amended Schedule and Order had the effect of preventing the Coroner from continuing his payments to constables acting in that large portion of the metropolis which is situated in the western division of the county.

Ques. 162. 1418.  
1436. 1449.

"That this discontinuance of the payments had been productive of much loss and dissatisfaction amongst the constables, and that in one instance a constable had positively refused to act upon the warrants of the Coroner, because such payments had been withheld.

Ques. 1442. 1549.

"That this Committee is apprehensive of what may be the effects of this restraint on the vigilance of the constables; and as the Act of Victoria has declared that the expenses attending inquests are to be supplied out of the county rate, they cannot consider that it is lawful to defray those expenses from any other fund. At the same time Your Committee cannot fail to notice, that in the 'Returns' which have been presented from the Clerks of the Peace in England and Wales, that Middlesex is the only county in which the payments to the constables out of the county rate, for the performance of their duties at inquests, are forbidden by the Justices, and Your Committee is at a loss to discover any reason for making this solitary deviation from a most useful and judicious practice.

Ques. 250. 1394.

"That it appears to this Committee that should any alteration in the state of the law be deemed advisable by your Honourable House, it might be expedient and just to submit any schedule of fees and allowances to constables, witnesses, or other persons, for confirmation, to one or more of the learned Judges of the Court of Queen's Bench, before it should receive the force of law.

Ques. 767. 1417.  
1422. 1424. 1464.

"That Your Committee does not discover in the Act 25 Geo. II., c. 29, in the Act Vict. I., c. 68, or in the case of the King against the Justices of Kent, any provision or decision which empowers the magistrates to inquire and determine whether there had been a 'necessity' for holding any particular inquest. But it appears to this Committee that it is quite within the province of the Justices of the Peace to decide whether an inquest has been 'duly' taken, as it appears to this Committee that the word 'duly' means that the inquisition had been properly drawn, that the jury were legally summoned and qualified, that

PROCEEDINGS OF THE COMMITTEE—*continued.*

that the inquest was held on view of the body, that the inquisition had been correctly signed by the jurymen, and that all the requisite forms of law on holding an inquest had been strictly observed.

“That considering that the useful and important functions which Justices of the Peace and Coroners are reciprocally called upon to perform in penitentiaries, gaols, work-houses, lunatic asylums and other places, it appears to this Committee that such public officers should stand, with regard to the exercise of their duties, in a state of perfect independence relative to one another; and that in calling into action the judicial functions of the Coroner, that officer ought not to be fettered by the apprehension of a personal or vexatious exercise of authority by individuals on whose conduct he may be called upon to adjudicate. With reference to this important subject, Your Committee conclude by quoting the language of the late Lord Chief Justice Tenterden :—

*Ques.* 270. 971, *et seq.* 1197. 1296. 1465. 1492. 1511. 1518. 1655, *et seq.*

““This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public and the advancement of justice; that, being free from action, they may be free of thought and independent in judgment, as all who are to administer justice ought to be. It is not to be supposed, beforehand, that those who are selected for the administration of justice will make an ill use of the authority vested in them. Even inferior justices, and those not of record, cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction. In the imperfection of human nature, it is better even that an individual should occasionally suffer a wrong than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it.”

*Barnewell & Cresswell, K. B., vol. 6, p. 625.*

It passed in the negative.

## LIST OF WITNESSES.

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# MINUTES OF EVIDENCE.

*Veneris, 29<sup>o</sup> die Maii, 1840.*

## MEMBERS PRESENT :

Colonel Thomas Wood.  
Mr. Thomas Duncombe.  
Mr. Aglionby.  
Mr. G. Knight.

Mr. Wakley.  
Mr. William Williams.  
Lord Eliot.  
Sir Thomas Fremantle.

## LORD TEIGNMOUTH IN THE CHAIR.

*William Baker, Esq., called in ; and Examined.*

1. *Chairman.*] ARE you one of the coroners of Middlesex ?—I am.
2. How long have you acted in that capacity ?—Nine years and eight months.
3. Then of course you were appointed before the Act of Victoria ?—Yes, I have been appointed coroner for the county, but have always acted in the eastern district.
4. The statute is the 1st of Victoria, c. 68 ?—Yes.
5. At that time considerable changes were made in the mode of making payments on account of inquests ?—Yes.
6. *Mr. Wakley.*] You say you act for the eastern parts of the county ?—Yes ; I have the names of the places, if the Committee wish to see them.
7. You have the names of the parishes ?—Yes.
8. Will you state them ; put the list in, it will shorten your answer ?—

*W. Baker, Esq.*

*29 May 1840*

*[The following List was put in, and read:]*

Edmonton.  
Enfield.  
Christchurch, Spitalfields.  
St. Matthew, Bethnal Green.  
Hamlet of Mile-end Old-town,  
Stepney.  
Liberty of Norton Folgate.  
St. Katharine.  
St. Luke.  
Coldbath-fields Prison and New  
Prison.  
St. George's East.  
St. Paul, Shadwell.  
Bromley, St. Leonard's.  
South Hackney.  
St. Leonard, Shoreditch.

Tottenham.  
St. Mary, Stratford Bow.  
Mile-end New-town.  
St. John, Hackney.  
St. John, Wapping.  
Liberty of East Smithfield.  
Whitechapel.  
St. Matthew, Bethnal-green.  
Hamlet of Ratcliff.  
All Saints, Poplar.  
St. Mary, Stoke Newington.  
West Hackney.  
St. Anne, Limehouse.  
Liberty of Glasshouse-yard.  
St. Botolph, Aldgate.

9. State the area ?—The area is stated in the Return.
10. The length and breadth ?—*[Witness refers to the Return.]*—The Return stated to me as to the extent of my district will be found at page 82 ; "length of district, from and including Enfield to the river Thames, 18 miles ; width, from Clerkenwell to the river Lee, dividing the county of Essex, 4½ miles ; and comprehending the foregoing places ;" that is at page 82 of the Return. It will be necessary that I should state as to Enfield and Edmonton, that they are included within the district of the Duchy of Lancaster ; I do not hold any inquests there at all ; the utmost extent of my distance is Tottenham, about nine miles.

11. What is the extent of the population of that district ?—Half a million ; the last

*W. Baker, Esq.*

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last census is 410,000 ; but there has been some addition to it ; I think the population cannot be less now than half a million ; it is very dense.

12. At the time of your appointment, in what manner was the expense of holding inquests defrayed ?—There was the fee of 20*s.*, and the mileage of 9*d.* out to the place of holding inquests, and not from it, which is all that is allowed by the Act of Parliament; these were paid by the treasurer of the county out of the county rate.

13. *Mr. G. Knight.*] Going and coming ?—Nine-pence out, and nothing home.

14. *Mr. Wakley.*] Were you paid the mileage from your place of abode to the place of holding the inquest ?—Only going to it.

15. You have not answered that part of the question as to the expenses ?—I was going to add, that the expenses of the jury and other expenses incurred were paid out of the poor-rates by the overseers.

16. What persons did those payments include ?—They were generally made to the constable and jury, which varied in different parishes ; Mile-end New-town was 16*s.* 6*d.* ; Bethnal-green, 16*s.* ; Stoke Newington, 16*s.* ; Shoreditch, 15*s.* 6*d.* ; and Mile-end Old-town, 17*s.* ; averaging somewhere about 16*s.* 6*d.* each inquest.

17. What was the nature of those payments ?—There was a small fee paid to the constable of the parish ; it varied in different parishes from 4*s.* 6*d.* to 6*s.* 8*d.*, and the expenses of the jury from 8*s.* to 10*s.* ; sometimes it was as high as 12*s.* ; it varied in different parishes ; there were hardly two alike.

18. At that time was any payment allowed for the use of a room in the public-house where the inquest was held ?—There was no payment.

19. *Lord Eliot.*] How did you obtain remuneration during that period ?—The Act of Parliament distinctly states the fee to be 20*s.*

20. *Mr. Wakley.*] How long did that state of things continue ; what were the circumstances which led to an alteration in the mode of payment ?—The reason of the alteration was a letter written by the Poor Law Commissioners on the 13th of March 1837 ; they issued a document, which is directed “ To the Churchwardens, Overseers and other Officers,” requiring them to account for the expenditure of the poor-rates ; and in one item there is this minute, “ With respect to the charges more commonly found in overseers’ accounts, but not authorized by any statute, they are such as follow : namely, charges for coroners’ inquests and charges properly payable out of the church-rates, must be disallowed as unfounded charges upon the poor-rates.” This was the first public intimation of disallowance by the auditor of overseers’ accounts of any such charge as that which related to coroners’ inquests.

21. That was the order issued in March 1837 ?—Yes.

22. *Mr. Duncombe.*] Then it was mixed up with the church-rate ?—No ; this is a very general letter, you observe ; it should be “ or ” charges ; it should be in the disjunctive, instead of “ and ” charges.

23. *Mr. Wakley.*] It was not till March 1837 that payments in parishes were discontinued ?—Not till that period.

24. Did you make any payments at inquests from March 1837 to August 1837 ?—Yes ; they were not discontinued immediately on the issuing of this document.

25. Did you make any representation to the Government, or to any other authorities on the subject ?—Yes, there was the opinion of the Attorney and Solicitor-general taken upon the subject ; they were of opinion that the first item in that account only applied to the parish. I think the Committee will be saved a great deal of time if I put this paper in, as part of the minutes which states the whole facts of the case ; I think the Committee will find this the more convenient mode of doing it. In consequence of an application from the magistrates, arising on the passing of the 1st of Victoria, this letter was addressed to them.

26. That is in consequence of the enactment of the 1st of Victoria ?—Yes ; and it goes back to show what the original state of things was as to the fees. This letter is signed by myself, and addressed to the clerk to the magistrates.

[The following Letter was put in, and read:]

CORONERS’ EXPENSES.

Limehouse, and 3, Crosby-square, Bishopsgate,  
19 September 1837.

Sir,

AGREEABLY to the order of the general session of the peace, held on the 22d of August last, I herewith transmit to you an account of the expenses incurred by me in holding inquests since

since the 15th day of July last, and I have at the same time made up my usual quarterly account, now nearly completed, in order that all the necessary documents may be forwarded to you as vouchers for my payments.

W. Baker, Esq.

29 May 1840.

In reference to your letter of the 8th instant, requesting me to transmit a scale of allowances, which I propose to be made, under the Act lately passed, I beg, in the first place, to point out to you, for the information of the court, a scale which has been long recognized as proper to be allowed to the constable, &c., which will be found in a work of one of the learned members of your court, Dr. Robinson, entitled, "*Lex Parochialis*," and which is also stated as a usual scale of allowance by Mr. Chitty, in his new edition of *Burn's Justice*, in a note at the foot of the title "*Constable*," vol. i. 511.

The items are as follow: attending coroner with notice of death, 4 s. 6 d.; summoning a jury and attending inquest, 6 s. 8 d.; expenses of jury, 10 s.

An objection having been raised by the Poor Law Commissioners to the payment of any of these items out of the poor-rate as being illegal, a correspondence ensued between them and several of the county coroners, which terminated in the opinion of the Attorney and Solicitor-general being taken, who acknowledged only the first item as a proper charge on the poor-rates as being necessarily incurred by the parish, and therefore payable therefrom, under the provisions of the 18th of Geo. 3, c. 19, s. 4; which, after stating that constables, headboroughs and tithing-men are often at great charge in doing the business of their parish, and were not sufficiently indemnified by the law, enacts "that every constable should every three months deliver to the overseers his account of all sums expended on account of his parish in all cases not theretofore provided for by the laws theretofore made, or by that Act, and directed payment accordingly out of the poor-rates."

They, however, repudiated the two other items, as ceasing to be part of the parish business, supposing them to be county business.

The apparent absurdity of a constable of a parish initiating a legal proceeding, in which he was afterwards to be immediately called upon to act under a different and distinct power and authority unconnected with the parish, was so astounding, that it caused a counter opinion to be taken on behalf of the constable of Whitechapel, who was mainly interested in the question, who, seeing that the coroner was possessed of no funds to meet the expenses of his office, very naturally began to question the solidity of the doctrine maintained by such high authority. It was of great importance to him, being an unsalaried officer, and having no less than 150 inquests forced upon him by the parish in the course of his year of office, arising chiefly from the London Hospital being situate within it; the cases arising in which oblige him not unfrequently to go long distances into Essex and other counties to procure evidence, often leading to great expense and trouble. Mr. Chitty's opinion was accordingly taken, who clearly showed, from the authorities quoted by him (4 M. S. Sum. 33; 2 Salk. 377; 7 Mod. 10; 2 Hawk. P. C. c. 9, s. 23, and the Declaratory Statute of Marlbridge, s. 25), that it was the continuous duty of the parish, and consequently the business of the parish constable, to attend on the inquests; he contended that as the parishioners were bound to be present at the inquest, it was important, and indeed necessary for the coroner to give them notice, which was the origin of the warrant to the constable to summon the jury, and that the execution of the warrant was therefore parish business, it being the common law duty of the parishioners to attend the inquest, and that the charge for the room came within the same principle, as it would be unreasonable and inconvenient in most cases that the inquest should be held in the open air. He also thought the same with reference to the other charges submitted to him as to expense of witnesses, the parish being bound to furnish such evidence or account of the death as they could procure, and he felt confident that the statute of 18 Geo. 3, would receive a liberal construction in such a case on behalf of a public officer; and the previous allowance of such charges also confirmed him; and he was finally of opinion that the Poor Law Commissioners had misapprehended the case by supposing that the charges were for doing county business.

These conflicting opinions, accompanied by a pressure of the necessity for some allowance being granted, have occasioned the recent law.

I have been a little more explicit on these points than is perhaps absolutely necessary from the tenor of your letters; but I have thought it material that the magistrates, who are now called upon to decide upon the scale of expenses to be allowed under the late Act, should be apprized that it was not the objection to the rate of charge, but to the fund from whence it should be paid, which has given rise to the present law, and that at the same time they should be as accurately informed as possible of the nature of the duties, the expenses of which they are called upon to provide for out of the county rate, and which the above statement will sufficiently shadow forth.

Before I proceed, however, to the scale of fees, I think it also necessary to call their attention to an Act passed in the 48th Geo. 3, c. 15, which enacts that dead bodies cast on shore are to be decently interred by the churchwardens and overseers, on penalty of 5 l. on the parties offending; but the treasurer of the county is to reimburse the expense of interment, with a reward of 5 s. to the party giving notice of the body within six hours after the discovery. Although the Act seems to relate to the sea-coast, there may be still some doubt whether its provisions might not be extended to the river Thames, as an arm of the sea, but I believe it has not been so generally acted upon. Whatever may be the construction of it, however, it appears to contain a very salutary provision, equally applicable to all rivers and canals. Bodies are generally found floating when in a putrescent state, and, independently



#### 4 MINUTES OF EVIDENCE BEFORE SELECT COMMITTEE

*W. Baker, Esq.*

29 May 1840.

of that, are more frequently covered with mud and filth than in the sea, so as to require to be cleansed before they are examined by juries; and it is frequently necessary that a room should be provided to deposit them in for the jury to view them in. When I state that I have between six and seven miles of river Thames coast within my district, a great part of which runs through a densely populated portion of the metropolis, independently of the St. Katharine, London, West India, East India and Regent's Canal Docks, besides many canal rivers and smaller waters; I need make no apology, I trust, for calling the attention of the court to the necessity of some allowance being made on this head, and in aid of it, I beg to lay before them a letter addressed to them from one of the beadles of a parish which has the most extensive coast, Mr. Thompson of Poplar, which is enclosed.

On the subject of a scale of charges for the room for inquest, juries, beadles, &c., I find that the parishes have varied, and scarcely any two appear to be alike. Mile-end Newtown I find to be 16s. 6d., Bethnal-green 16s., Stoke Newington 16s., and Shoreditch 15s. 6d., and Mile-end Old-town 17s. It will be found that I have taken somewhere about the average of these, and allowed 16s. 6d. Although I have not expressly allowed the 6s. 8d. charged for the beadles or constables attending the inquest, it has not been because I do not think them fairly entitled to such an allowance, but because all the parishes do not appear to have recognized it. I have thought it better to leave it for the determination of the magistrates than exercise a discretion myself on the subject. It has been probably considered by the vestrymen that this formed a part of their ordinary parochial duty, and was included in their salary; but as the Poor Law Commissioners have abrogated these and many other duties of these functionaries, and their salaries have been proportionably reduced and these allowances discontinued, it does seem to be a fair subject of allowance now, and as to the constable who receives no salary, there can, I think, be no doubt whatever entertained of its propriety, the amount being reasonable.

In regard to the allowance to witnesses, I need only refer the magistrates to the opinion expressed by the commissioners appointed by his late Majesty to inquire into the county rate; the law has sanctioned the allowance in the case of medical witnesses; and if the principle is upheld in their case, it seems difficult to find a reason why it should not be carried out to witnesses in general. The commissioners, I believe, recommend the same allowance as is granted to witnesses at sessions, who come beyond a distance of four miles; but still the poor man who loses his day's labour, or a portion of it, by coming a short distance, seems entitled to some consideration, and I have often had painful appeals made to me of this kind.

Upon the whole, then, the scale of charges for the consideration of the magistrates appears to me to be as follows:

Beadle or constable attending the coroner with notice of death, about 4s. 6d. or 5s.; summoning jury and attending inquest, 6s. 8d.; expenses of jury, 10s. or 12s.; room for inquest, 5s.; room for deposit of body where necessary, 5s.; witnesses (except medical), sessions allowance in cases of trial, ; cleansing and bringing up a drowned body, 5s. I shall be happy in communicating any further information which may be deemed necessary; and am,

Sir, your most obedient servant,

*W. Baker, Coroner.*

This is dated on the 9th of September, shortly after the passing of the Act of Victoria.

27. Lord *Eliot*.] Is there much difference between the scale you recommended and that adopted by the magistrates?—No.

28. Mr. *Wakley*.] What was the date of the schedule?—It was amended in December 1839. It was made on the 7th of November 1837; it was amended in December 1839.

29. The fees you mention there, of 16s. and 17s., do not include the payment to medical witnesses?—O, certainly not, that is totally distinct; that was allowed by another Act of Parliament.

30. It was not at that time paid by the coroner, but by the overseers?—The Medical Witness' Act passed the 17th August 1836, allowing one guinea (the 6th & 7th of William the Fourth, cap. 89), and one guinea for a *post-mortem* examination.

31. These payments were not made by the coroner, but you granted an order on the overseer of the parish for the payment?—Yes.

32. Was that mode of payment altered by the Act of Victoria?—It was; all those fees were formerly payable by the overseers out of the poor-rates, and that Act of Parliament states them to be payable out of the poor-rates—the Medical Witness' Act.

33. Have you a copy of the first schedule of fees which was made by the magistrates under the Act of Victoria, in November 1837?—Yes; that is the schedule I have just handed in.

34. Have you a copy of the original schedule here?—I am afraid I have not as it stands originally, but you will find it is precisely that, with the exception of those words

words which are scored under ; there is the original order, but it is altered by the amendments being added to the print in writing. If you take away the writing, the following is the original schedule :—

*W. Baker, Esq.*

29 May 1840.

*[The following was put in, and read:]*

### MIDDLESEX.

**A SCHEDULE of FEES, ALLOWANCES and DISBURSEMENTS** to be paid by the Coroner, pursuant to the Act 1 Vict., c. 68, intituled, "An Act to provide for Payment of the Expenses of holding Coroners' Inquests," made at the General Quarter Session of the Peace held in and for the County of Middlesex, by adjournment on Tuesday the 7th day of November 1837.

**THE CONSTABLE.**—If residing within two miles of the coroner's office, for giving information to the coroner upon application for a warrant to summon a jury, 1s.

An additional allowance of 3d. per mile, that he may be compelled to travel each way (to and fro) beyond the distance of two miles from the place where the body lies to the residence of the coroner to procure the warrant.

For summoning the jury and witnesses, and attending upon the coroner during the inquest for a part or the whole of a day, 6s. 6d.

And for attendance during a part or the whole of any adjournment day, 3s. 6d.

**DEAD BODY.**—For receiving and keeping, in cases of accident or emergency, the body, or for receiving and keeping the body (where there is no parochial dead-house or other proper receptacle, until the inquest be held, a sum at the discretion of the coroner, not exceeding 5s.

**INQUEST ROOM.**—For the use of a room, if necessarily engaged in a public-house, or hired elsewhere when more convenient, and the inquest does not occupy more than five hours, a sum at the discretion of the coroner, not exceeding 5s.

If the inquest be continued more than five hours, a sum at the discretion of the coroner, not exceeding for the whole day, 7s. 6d.

And an allowance at the same rates for a part or the whole of any adjournment day.

**WITNESS.**—To the person or persons finding the body apparently drowned, for bringing it on shore, and giving information thereof to a constable or parish authority of the place, a sum (to be divided among such persons at the discretion of the coroner) not exceeding 4s.

To witnesses summoned giving material evidence, and to witnesses not summoned giving material evidence for one hour's attendance, each witness, 1s.

And for succeeding hours, 6d. per hour, not exceeding in the whole for a day's attendance, 3s. 6d.

And at the same rates for a part or the whole of a day's attendance on any adjournment of the inquest.

To witnesses being summoned 3d. per mile each way (to and fro) for every mile beyond the distance of two miles they may be compelled to travel to attend the inquest, and at the same rate for attending on any adjournment day.

(These allowances are to be paid only to such witnesses who it may appear to the coroner have suffered by loss of time or by expense of attending the inquest, and are not to extend to medical witnesses being legally qualified practitioners, and giving evidence under the provisions of the Act of the 6 & 7 Will. 4, c. 89.)

(No allowance to the jury either in money or refreshment.)

*H. C. Selby,*

Clerk of the Peace.

**N.B.**—The necessary printed forms of summonses for jurymen and witnesses will be supplied by the county to the coroner, who shall be requested to distribute them to the constables from time to time as they may be required.

35. Do you consider that that was a just schedule?—I considered it worked very fairly. I thought the whole of it was very proper.

36. You found it to work very well?—As far as it went ; but I have expressed an opinion on the subject of the juries, there is no allowance in that to the juries ; on the contrary, it is expressly negatived, "No allowance to the jury, either in money or refreshment."

37. Is that a source of dissatisfaction to juries?—Yes, it is a source of great dissatisfaction ; and in a very impoverished neighbourhood which mine is, I find it particularly so, and it is often the painful duty, or rather the pleasing duty on such occasions, to give the money out of their pockets than to receive any thing ; I have often seen the fees given up.

38. Do you mean to the relatives of the deceased person?—Yes.

39. There has been a subscription?—Yes ; the jury are not only often called on to throw away their time, but to throw away their money also.

*W. Baker, Esq.*

29 May 1840.

40. *Chairman.*] On what ground were the fees disallowed to the jurors?—On no other ground that I am aware of than that there was a power, on the part of the magistrates, to do as they pleased about it.

41. *Mr. Wakley.*] You say the average allowance of the parish to jurors was 10 s.?—Yes, before the Act of Victoria passed; and it is felt hard by the jurymen, for another reason, that in the adjoining county of Surrey, they have augmented the allowance, which was formerly 10s. 6d., but is now 12 s. to the jury, by an express order of sessions.

42. *Mr. G. Knight.*] By whom were those payments made?—By the overseers. They were voluntary payments where they found a distressing case; they are subject to certain expenses sometimes; they are voluntary on their part entirely; they are frequently called on by poor Irish people, and people in very great distress; and there is a general feeling that if one does it, another cannot do otherwise. I only mean to say that there is great necessity for an allowance in impoverished neighbourhoods, where people cannot afford to lose their time.

43. *Mr. Wakley.*] What allowance would you suggest in such cases?—I allowed 12s. before the Act of Victoria, when I had the power of so doing.

44. *Mr. W. Williams.*] Do your present observations apply to the period before the passing of the Poor Law Amendment Act?—They do, so far as to the payment of their own particular fees; I had a case on the other day, where the jury threw away their money and their time also, having no fees.

45. *Mr. Wakley.*] What you mean is, that at the time juries were paid by the parishes, they sometimes gave up their fees to the distressed relatives of the deceased person?—Yes.

46. *Chairman.*] Has any representation been made to the magistrates on the subject of such complaints?—Not beyond my letter, I think; I never anticipated any difficulty, on the part of the magistrates, in making an allowance to the jury, or I should have been more distinct on that point.

47. Have any representations been made since in consequence of the discontinuance of the allowance?—I am not aware that there has.

48. Have you any reason to believe there is any dissatisfaction in consequence?—I have not any reason to believe there is.

49. *Colonel Wood.*] What power have you of enforcing the attendance of jurymen?—The law enables the coroner to compel a jurymen to attend; he will be returned to the sessions if he does not.

50. What is that?—There is considerable doubt entertained in my mind whether the penalty clause of the Act of Parliament which relates to juries in general applies to the coroner's jury; my opinion is that it does not; the opinion of other coroners is that it does; mine is, that it does not.

51. Have you met with any unwillingness on the part of the inhabitants to come forward as jurymen on coroners' inquests?—Oh dear, no.

52. Are they generally summoned from the neighbourhood?—They do not like losing their time without remuneration; and finding that other counties make remuneration to jurors, they say, "Why are not we allowed also?" It is a bad mode of administering the law, to allow something in one county and not in another.

53. Do they come from a distance, or are they summoned in the neighbourhood?—Generally in the neighbourhood.

54. Are they summoned at a time which interferes with their occupation, or of an evening?—All day long; I hold inquests at all periods of the day, from morning to evening; but I endeavour as much as possible to accommodate my time to the time which best suits the jurors.

55. *Mr. G. Knight.*] Who makes out the list of jurymen?—The constable; the warrant is issued to him.

56. It is his right and duty to select the persons he thinks proper?—Yes; that is done by the constable.

57. *Mr. W. Williams.*] If a person be summoned to attend on a coroner's jury, and he refuses or neglects to do so, what are the penalties he is subject to?—He is liable to be returned to the sessions; that is the only law I can find on the subject; they can fine him for contempt of court.

58. To what extent?—Forty shillings, I believe; it is an expensive proceeding; I heard of an instance of a man who paid 80 l. because he refused to serve on a jury; that was a butcher.

59. Has

59. Has not the coroner the power of fining for contempt?—No, I think not; my opinion is, that inasmuch as the Act of Parliament states that the coroner is to find his jurors, as he did heretofore, and afterwards giving a specific penalty on coroners' inquests, it applies only to those cases in which the coroner acts in the room of the sheriff in those particular judicial duties he performs.

60. Mr. T. Duncombe.] Have you returned many people to the sessions?—I have not done that yet.

61. There is no difficulty in collecting a jury, then?—No, none in the world; I have none; I have been obliged sometimes to wait.

62. Mr. Wakley.] With the exception of the omission of an allowance to jurors, have you considered the first schedule made by the magistrates under the Act of Victoria to have been a just one?—I think so; there are no fees allowed in respect of estreats of deodands; I perceive by the return made to The House that several of the coroners make those charges to the magistrates; we have never made them in Middlesex.

63. Lord Eliot.] Since the discontinuance of an allowance to jurors, do you apprehend there would be any difficulty of procuring evidence to be given before the jury if you had no power of compelling their attendance?—No, except under the Jury Act; but my own strong feeling is, that the Jury Act does not apply, and that we have only power to send it to the sessions; I find this laid down in Mr. Jervis's book; but this book was written before the Act passed: "Coroners have no power to impose any fine or amercement; if, therefore, no return be made to the coroner's precepts, or the jurors who are summoned and returned do not appear, no fine can be imposed by the coroner, but he must return the defaulters to the assizes or sessions, where they shall be fined or amerced for their default. Numerous instances occur in the ancient writers of jurors being fined *quia non venerunt ad inquisitionem coram coronatore*."

64. Mr. W. Williams.] Since the payment has ceased to juries, have you practically found any difficulty in assembling juries?—Not the least; I live in a very dense neighbourhood, so exceedingly dense that one could always get men to come forward, if those did not come who were summoned.

65. Mr. Wakley.] You have stated what you allowed?—The point about the estreats.

66. That schedule of fees having been made in November 1837, continued in force till when?—It continued till 19th of December 1839, when the alterations made in ink in this paper were made.

67. State what they are?—"The Constable. If residing within two miles of the coroner's office for giving information to the coroner upon application for a warrant to summon a jury, 1s.; an additional allowance of 3d. per mile, that he may be compelled to travel each way (to and fro) beyond the distance of two miles from the place where the body lies to the residence of the coroner to procure a warrant. For summoning the jury and witnesses, and attending upon the coroner during the inquest, for a part or the whole of a day, 6s. 6d.; and for attendance during a part or the whole of any adjournment day, 3s. 6d.:" the words added are, "All these fees are to be paid at the discretion of the coroner." Then, again, nearly at the close, when you come to this part, "These allowances are to be paid only to such witnesses," it says, "and constables, who it may appear, &c.;" then there are these words added to the foot of it, "Nor to domestic servants, nor to constables in the metropolitan police force, nor to parochial constables or officers receiving regular salaries or wages. Note.—Any constable demanding money under pretence of warrants for burial will render himself liable to be prosecuted." That is the only alteration.

68. Did that alteration extend to the withdrawal entirely of the 7s. 6d. which had been previously allowed under the first schedule to constables?—Yes, it did, if he was a paid officer.

69. Did you say a paid officer—a paid constable?—A paid constable.

70. Do you make a distinction?—Our warrants are only sent to constables and headboroughs; and I look to constables and headboroughs to perform those duties; if they are performed by others, I can only recognize the principal.

71. Subsequently to the making of that amended schedule, did you receive any order of court on the subject of the payment of the constable; have you got those orders with you?—On the 16th of January 1840, there is an order of sessions: "Resolved, that payment of the accounts presented by the coroners at the present session be postponed to enable the committee to ascertain how far the order of

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court of the 19th of December last has been complied with, and that hereafter no payment be allowed to constables when there is a salaried constable in the parish."

72. Is the Committee to understand that first of all a payment to salaried constables was entirely interdicted?—Yes.

73. And the order of court afterwards extended to this, that having ordered that the payment to the salaried constables should be discontinued, that the payment to any constable, if there was a salaried constable in the parish, should also be discontinued?—Exactly so.

74. Then under that arrangement, what constable could you pay legally?—I endeavoured to ascertain, as well as I could, if there was any paid constable, and I have got a return from the clerk; I find that there was no salaried constable or headborough; they received no salary, generally speaking; there is a slight exception; there is one man who receives 6*l.* gratuity, and 6*l.* as keeper of a fire-engine; that is not in the nature of any salary for officers of this sort; this is a summary of the applications I have made.

75. Do you consider this order good in law, or is it part of the schedule?—It becomes virtually a part of the schedule by the alteration.

76. Is it used as a schedule; does the Act recognize any order of court?—That perhaps is a technical objection which I have not yet considered.

77. Do you recollect when you received this order?—You find it minuted on the back.

78. I see it was adopted on the 16th of January, and not forwarded to you until the 24th of February?—If that is the minute on the back, it says 16th of January 1840, but received by me on the 24th of February.

79. Colonel Wood.] Do you not consider that an order for enforcing the schedule to explain the manner in which it is to be carried into effect?—I should say it is sufficient for that purpose; I think the Act of Parliament says that the justices in session may alter the schedule from time to time.

80. Are you aware if the magistrates meant the words "salaried constable" to apply to the metropolitan police?—They intended it to apply to others, such as beadles of the parish.

81. Have you found any difficulty in employing the police in summoning witnesses?—We have never employed them at all; if you will have the kindness to refer to the report published by the magistrates, you will find that the commissioners object to it.

*[The following paper was put in, and read:]*

To Her Majesty's Justices of the Peace in Quarter Session assembled.

31 October 1839.

The Committee, to whom it was referred on the 10th October last, to inquire into the causes of the increase of inquests since the passing of the Statute 1 Vict., c. 68, and to reconsider the schedule of fees now paid under that Statute, and to report generally, have to report, that in pursuance of the order of reference, they directed their attention to the number of inquests which have been held since 1833, which are as follows:

YEARS.	MR. STIRLING.		MR. BAKER.	
	No. of Inquests.	Natural Deaths.	No. of Inquests.	Natural Deaths.
1834 - - - - -	521	196	447	144
1835 - - - - -	512	215	506	196
1836 - - - - -	536	211	482	182
1837 - - - - -	598	279	602	282
1838 - - - - -	736	378	777	387
MR. STIRLING AND MR. WAKLEY.				
1839 to 14th September -	408	202	561	272

The Committee requested the attendance of Mr. Baker and Mr. Wakley, the coroners of this county, as well as that of Mr. Bell, who acted as clerk to the late Mr. Stirling for 15 years, and continues to act as clerk for Mr. Wakley. From the evidence of the coroners and

and of Mr. Bell, the increase in the number of inquests is to be attributed, in their opinion, to four causes :

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1. To the vigilance of the police.
2. To the registration of deaths.
3. To the payment of medical witnesses, under the provisions of 6 & 7 Will. 4, c. 89.
4. To the fees paid to constables.

The Registration Act, and the Act authorizing the payment of medical witnesses, came into operation the 17th August 1836, and the schedule of fees for the payment of witnesses and constables, as settled by this court, 7th November 1837.

Considering that the very great increase which has taken place in the number of inquests since the date of these Acts of Parliament, the Committee concur in the opinion expressed by the coroners and Mr. Bell with reference to the three last causes ; but they do not entirely agree with them in opinion as to the first. The attention of the police was necessarily drawn to the occurrence of violent or sudden deaths and casualties long before the period when the great increase in the number of inquests appears ; and it will be seen, by a letter from the Commissioners of Police annexed to this report, that in January 1835, an order was issued by them, requiring the police to give notice to the coroner and parochial authorities in all cases where an inquest was necessary.

It further appeared, from the evidence of Mr. Baker, that he considered himself bound by law to hold an inquest whenever he received notice to do so from a constable, and that in nine cases out of ten, such notices were left at his house while he was absent on the duties of his office. It is thus manifestly impossible for him, in a great majority of cases, to ascertain the propriety of granting his warrants from any previous inquiry, a practice which the Committee think is susceptible of amendment.

The Committee conceive that a coroner's inquest is a judicial inquiry, and not merely a medical investigation ; and that in this, as in every other judicial inquiry, fair and reasonable grounds for its necessity should be shown previously to the inquiry being instituted ; and they, therefore, think that it is the duty of the coroners, before issuing their warrants for holding inquests, to institute such preliminary inquiries as to the circumstances of the death as may be practicable in the exercise of a due diligence, for the purpose of ascertaining the necessity of the inquest ; and it is stated by Mr. Bell that such was the practice of the late Mr. Stirling, and continues to be acted upon by Mr. Wakley since his appointment ; and that, since February, he has, in above 30 instances, refused to issue warrants for inquests which have been applied for, in consequence of having ascertained from such preliminary inquiries that these inquests were unnecessary. In this recommendation, your Committee have no wish to interfere with the practice of the coroner, except as it bears upon the number of inquests held, and the expense which it entails upon the county.

The Committee have read the paper of instructions circulated by Mr. Wakley amongst the constables, with respect to so much of it as requires the constables to inform themselves of certain particulars touching the death of the party, for the purpose of enabling the coroner to judge of the necessity of an inquest ; the Committee consider them judicious and useful ; and with respect to the other part, requiring constables to give notice to the coroners in the several cases of death therein enumerated, the Committee offer no opinion, as they do not think that the court can exercise any control over the coroner, as in the cases when he may think it right to hold an inquest, the power of this court, in their judgment, being limited to deciding whether the inquests which have been held were unnecessary, and ordering or withholding the payment of the coroner's fees accordingly. The Committee think, however, that they may be allowed to one class of deaths in which Mr. Wakley has stated to them that it is his invariable and inflexible rule to hold inquests in every case, namely, in cases of sudden death, founding his determination not only on motives of public policy, but on the terms of the statute, 4 Edw. 1, which directs the inquiry to be made upon such as " be slain, or suddenly dead or wounded." The Committee would merely refer the court to the following commentary on this part of the statute, which is to be found in East's Pleas of the Crown, vol. 1, p. 382 : " This power, however, is to be exercised within the limits of a sound discretion. There ought at least to be a reasonable suspicion that the party came to his death by violent or unnatural means ; for if the death, however sudden, were from fever or other apparent visitation of God, there is no occasion (with the exception before mentioned, in cases of prisoners) for the coroner's interference."

The Committee, in the course of their inquiry, felt that it would be more satisfactory to the public, if the duty of giving notice to the coroners, and summoning the juries, on the occurrence of deaths of a violent or sudden and suspicious nature, were discharged (within the limits of the metropolitan police force district in this county) by the superintendents of police, who must necessarily have the best means of information within their respective divisions in such circumstances ; and who, from holding responsible public stations, would exercise both vigilance and a proper discretion in ascertaining the necessity of holding an inquest, which rests at present, in a great degree, on the judgment of the parish constables, and a communication to this effect was made to the Commissioners of Police. It will be seen from the letters annexed to this report, that the Commissioners have expressed their willingness to render the services of the police available in giving notice to the coroners ; but that, on their submitting the application of the Committee to the proper quarter, it has

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not been thought expedient, for the present, that the police should undertake the further duty of summoning the juries.

The Committee have revised the schedule of fees, allowances and disbursements to be paid by the coroners pursuant to the Act 1 Vict. c. 68, as settled by this court on the 7th of November 1837, and they recommend that the fees and allowances thereby authorized to be paid to witnesses and constables should be no longer paid to the following persons :

1. Domestic servants.
2. Constables in the metropolitan police force.
3. Parochial constables or officers receiving fixed salaries or wages.

In connexion with this subject, the attention of the court is directed to the difference in the sums allowed by the two coroners on each inquest from the 1st of January 1838 to the 14th of September 1839. There have been 1,144 inquests held by Mr. Stirling and Mr. Wakley ; and the aggregate expenses amounted to 1,150*l.* 12*s.* 10*d.*, being on the average 1*l.* 0*s.* 3*d.* for each inquest ; while, during the same period there were 1,338 inquests held by Mr. Baker, and the aggregate expenses amounted to 2,039*l.* 10*s.* 3*d.*, being on the average 1*l.* 11*s.* 2½*d.* for each inquest. Mr. Wakley, in his evidence, stated to the Committee that he never found any dissatisfaction expressed by witnesses or constables with the amount of their expenses ; and, considering that the coroner for the western division must allow a greater sum to constables for mileage in many instances than is allowed in the other division, the Committee feel bound to state, that they can discover no cause for so large an excess as one-third in the expenses allowed by Mr. Baker over those allowed by Mr. Wakley, and to express their opinion that a considerable reduction may be made for the future by that gentleman, without detriment to the due execution of his office, and with advantage to the rate-payers. The schedule of fees, allowances and disbursements, as amended by the Committee, is annexed to this report. All which is submitted, &c.

*P. Laurie, jun., Chairman.*

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#### Appendix, No. 1.

Sir,

Whitehall-place, 18 October 1839.

THE Commissioners of Police have to acknowledge the receipt of your letter of the 14th instant, transmitting the copy of a resolution of a committee of magistrates, dated the 14th instant, and to acquaint you, in reply, that the Commissioners will be glad to render the services of the police available in carrying into effect the alteration suggested, by which it is stated the great expense now incurred would be saved to the rate-payers.

The resolution transmitted only refers to the giving notice to the coroner, which has in fact been done by the police since January 1835. A copy of the order of the Commissioners on the subject is now enclosed. If it be contemplated to devolve upon the police also the duty of summoning the jury and performing the other duties on the holding an inquest, the Commissioners would beg to have a further communication, with a statement of the necessary details, before they can offer an opinion how far it may be in their power to assume such additional duties with the present strength of the police.

I have the honour to be, Sir,

Your most obedient servant,

*P. Laurie, Esq., jun.*  
&c. &c. &c.

*Richard Mayne.*

(Copy.)

3 January 1835.

IN all cases of violent or sudden death, or casualties, where a coroner's inquest should be held upon the body, the police, whenever the case comes under their cognizance, will, in addition to giving information to the parochial authorities of the district, give information to the coroner also, and report upon the occurrence sheet that they have done so at the time the occurrence is reported.

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#### Appendix, No. 2.

Sir,

Whitehall-place, 26 October 1839.

IN reference to your letter of the 14th instant, and accompanying resolution, and the Commissioners' answer dated the 18th instant, and to what passed subsequently at an interview with yourself on the same subject, the Commissioners of Police beg now further to acquaint you, that they have submitted for consideration, in the proper quarter, the question whether the officers of the metropolitan police should undertake the duty of summoning the coroner's jury within the police district, in all cases where an inquest is to be held ; and it has been decided that for the present it would not be expedient that the metropolitan police should undertake the performance of this duty, but they shall continue, as heretofore, to give notice to the coroner in all cases where it shall be thought desirable that an inquest should be held.

I have the honour to be, Sir,

Your most obedient servant,

*P. Laurie, Esq., jun.*  
&c. &c. &c.

*Richard Mayne.*

Appendix,



## Appendix, No. 3.

W. Baker, Esq.

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## MIDDLESEX.

(The amended Schedule.)

A proposed SCHEDULE of FEES, ALLOWANCES and DISBURSEMENTS, to be paid by the Coroner, pursuant to the Act 1st of Victoria, cap. 68, intituled, "An Act to provide for Payment of the Expenses of holding Coroners' Inquests."

**THE CONSTABLE.**—If residing within two miles of the coroner's office, for giving information to the coroner, upon application for a warrant to summon a jury, 1*s*.

An additional allowance of 3*d*. per mile for every mile that he may be compelled to travel each way (to and fro) beyond the distance of two miles from the place where the body lies, to the residence of the coroner, to procure the warrant.

For summoning the jury and witnesses, and attending upon the coroner during the inquest, for a part or a whole of a day, 6*s*. 6*d*.

And for attendance during a part or the whole of any adjournment day, 3*s*. 6*d*.

*All these fees are to be paid at the discretion of the coroner.*

**DEAD BODY.**—For receiving and keeping, in cases of accident or emergency, the body, or for receiving and keeping the body (where there is no parochial dead-house or other proper receptacle) until the inquest be held, a sum, at the discretion of the coroner, not exceeding 5*s*.

**INQUEST ROOM.**—For the use of a room, if necessarily engaged in a public-house, or hired elsewhere when more convenient; and the inquest does not occupy more than five hours, a sum, at the discretion of the coroner, not exceeding 5*s*.

If the inquest be continued more than five hours, a sum, at the discretion of the coroner, not exceeding, for the whole day, 7*s*. 6*d*.

And an allowance at the same rates for a part or the whole of any adjournment day.

**WITNESS.**—To the person or persons finding any dead body, and for bringing on shore any dead body apparently drowned, and giving information thereof to a constable or parish authority of the place, a sum (to be divided among such persons, at the discretion of the coroner) not exceeding 4*s*.

To witnesses summoned, giving material evidence, and to witnesses not summoned, giving material evidence, for one hour's attendance, each witness 1*s*.

And for succeeding hours, 6*d*. per hour, not exceeding in the whole for a day's attendance, 3*s*. 6*d*.

And at the same rate for a part or the whole of a day's attendance on any adjournment of the inquest.

To witnesses being summoned, 3*d*. per mile each way (to and fro) for every mile beyond the distance of two miles, that they may be compelled to travel to attend the inquest, and at the same rate for attending on any adjournment day.

(These allowances are to be paid only to such witnesses *and constables* who it may appear to the coroner have suffered by loss of time or by expense in attending the inquest, and are not to extend to medical witnesses being legally qualified practitioners, and giving evidence under the provisions of the Act of the 6th and 7th Will. 4, cap. 89, *nor to domestic servants, nor to constables in the metropolitan police force, nor to parochial constables or officers receiving regular salaries or wages.*)

(No allowance to the jury either in money or refreshment.)

*Note.*—Any constable demanding money, under pretence of warrants for burial, will render himself liable to be prosecuted.

*N.B.* The necessary printed forms of summonses for jurymen and witnesses will be supplied by the county to the coroner, who shall be requested to distribute them to the constables from time to time, as they may be required.

*Note.*—The words above, printed in *italics*, show the alterations in this, the amended, Schedule.

## Appendix, No. 4.

INSTRUCTIONS from the Coroner for *Middlesex*.

35, Bedford-square, London, September 20th, 1839.

I HAVE to request that, after the 29th day of the present month of September 1839, all applications relative to the holding of inquests may be made to me at 35, Bedford-square, London.

Thomas Wakley, Coroner.

\* \* On applying for warrants for the taking of inquests in the western division of Middlesex, the constable or beadle is desired to answer such of the following questions as may concern each particular death. The coroner hopes, therefore, that the list will be carefully kept, so that the necessary answers may be given whenever application is made for a warrant.

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QUESTIONS to be answered on applying for a Warrant.

1. When did the death happen?
2. When was the body found?
3. Was the deceased a male or female, an infant, a lunatic, or a pauper?
4. What is thought to have been the cause of death?
5. Is the body in a fresh or in a decomposed state?
6. If it be supposed that poison was the cause of death, what was the poison?
7. If any medical practitioner was in attendance before death, what is his name?
8. If the death was sudden, was there any previous illness, and for what length of time?
9. At what public-house or other place is the inquest to be held?
10. How far is the body from that public-house or other place?

In many cases answers to a few only of the above questions will be sufficient.

Notice shall be given to the coroner by headboroughs, the police, parish constables and beadles in all cases—

When persons die suddenly.

When persons are found dead.

When persons die from any act of violence or any accident.

When women die during labour, or within a few hours after delivery.

When persons are suspected to have died from the effects of poisons, or quack medicines.

When persons die who appear to have been neglected during sickness or extreme poverty.

When persons die in confinement, as in prisons, police-offices or station-houses.

When lunatics or paupers die in confinement, whether in public or in private asylums.

82. Do the police now give you notice of sudden deaths?—Yes, ever since 1835.

83. But they have not yet undertaken the duties of summoning the jury?—No; it was a particular request of my own; I applied to the commissioners of police, thinking it important that they should convey to the coroner information.

84. Are there any objections to that arrangement being carried into effect,—the summoning a jury?—If you were to place the whole power in the hands of the police exclusively, I should say there would be very great objection while the present law remains, which renders the parish liable to indictments for not holding an inquest in cases in which the law requires it to be held, and therefore the power would be removed from the parochial officers, who would have no control over it if it was entirely in the possession of the police; that I think would be the ground of the objection; I say there is no objection to their having a simultaneous power with the parish constables.

85. Are you speaking of the notice or summoning the jury?—To understand your question it would go to this; if the whole power were placed in the hands of the police, it would take it out of the hands of the overseers and constables.

86. What are the objections involving the duties of summoning the jury by the metropolitan police?—I am not aware what objections there may be on the part of the police; I cannot tell that; it is immaterial to the coroner, so long as the jury are summoned, whether it is by one party or another.

87. Are there any objections on the part of the public?—It would abstract them *pro tanto* from the other duties they have to attend to.

88. The notice is now given by the police?—Yes; supposing a man going his rounds finds a man killed on the spot, he writes a note to the coroner.

89. On whom do you depend now, in speaking of notices of sudden deaths, or cases in which inquests are required?—On the parochial officer, the constables and the police also; since 1835 I rely upon both.

90. You receive notice from both parties?—Yes, I frequently get double notice.

91. Do you ever find cases in which the police omit to give you notice?—Oh yes, very often.

92. In the generality of instances do the police give notice, or do the parochial constables?—I should say that the parochial constables are more in the habit of giving notice than the metropolitan police.

93. Mr. *Wakley*.] In what proportion?—Three to one.

94. Mr. *W. Williams*.] Do they depend on each other to give such notice?—The order to the police is positive; they would give notice independently of the constable.

95. Do you find numerous instances in which the police have neglected to perform their duty, and it is performed by the parochial authorities?—O yes.

96. Do you wish to qualify that answer?—I know several; I will tell the Committee the way in which it arises.

97. Do you charge it on them as neglect?—No, the term “neglect” is not, perhaps,

perhaps, the strict term ; “ omission ” is the term, I should say. I was going to mention the reason why the parochial officers obtain information which the police cannot ; an application is made to the parochial officer for a coffin, on a grant to bury the dead, and the information may be conveyed to them according to the ancient means which the law has afforded, without any knowledge on the part of the police that any such event has occurred.

98. Colonel *Wood*.] Why may not the overseer make communications to the police as well as to the parochial constables ?—He may not have the knowledge of the fact.

99. What do you mean by officers ; do you not mean the overseers ?—The overseers and the constable, generally speaking, are the parties ; the police may have no knowledge of any circumstance of the kind ; perhaps they move about very thinly in the course of the day, but there are more at night-time ; and when they disappear, and go from their office, the knowledge of the particular accidents happening at that time may not have transpired, and may only be acquired afterwards.

100. Are applications made to constables for coffins for paupers ?—Yes.

101. Is the constable the officer who furnishes the coffin for the paupers ?—Yes, the constable or the beadle of the parish ; there are constables, headboroughs and beadles.

102. Is it not the duty of the overseer to furnish decent means of burial ?—He is the person who does it ; he is the party who has the control ; he still has not the immediate control, he receives generally his information primarily from the constable.

103. In what cases do you allude to ?—I would put a case exactly : supposing a man died suddenly in the middle of the night under circumstances of suspicion ; the policeman might be off his duty before the circumstances were known, and another person might acquire the knowledge of it during the next day, a constable or parish officer, and he would give notice to the coroner ; the policeman, though present at the spot and in the exercise of his duty, might know nothing about the matter.

104. Explain to the Committee how it is that applications are made to constables for coffins for the burial of persons who die suddenly ?—I say constable, meaning one of the parish officers only.

105. Whom do you mean by parish officers ?—They go under different names, constables, headboroughs and beadles ; they are the parties who do that particular duty ; they are the officers of the overseers ; they act by authority of the overseers ; and they are the parties who are moving through different parts of the parish, who receive information ; and if there is any necessity, they communicate it to the overseers, and receive a remuneration or allowance.

106. Mr. *Wakley*.] Do you believe that both descriptions of constables, the parochial and police, would act well, with reference to giving notices, if both had equal power ?—Yes, I think so ; that is my decided opinion ; I think we want increase of power, and that the more the door is open to investigation of persons dying suddenly, or by violent deaths, the better the duty will be performed.

107. You were asked whether there were any objections to allowing the police to give notice, and to summon the juries ?—Yes.

108. Have cases come before you of persons who have died in station-houses ?—Yes.

109. Who have summoned the juries in those cases ?—The parochial authorities always order the juries to be summoned.

110. In such cases, would it not be calculated to excite a suspicion against the police if they were to summon the juries ?—Yes ; or the police might cover their own default, and give no information at all if they had it exclusively in their own power.

111. Do you consider the two descriptions of constables, both exercising the same functions, calculated to exercise a reciprocal check on each other ?—Yes, exactly so ; and if you will allow me, I have expressed that opinion here pretty clearly ; it is in page 33 of a letter lately addressed by me to the magistrates of Middlesex : “ Those who have most watched, and are therefore best able to appreciate the working of the new system, know that no institutions require more vigilance and more cautious jealousy on the part of the inhabitants than the police, and the establishments under the new Poor Laws. Let the police on the one hand, and the subordinate officers appointed under the Poor Laws on the other, act upon each other as regards the duties of the coroner,

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or even as respects their other duties, and it requires no great foresight to bring the mind to the conclusion that each will be disinclined to interfere with the other, and that they will seek to throw a veil over each other's defaults; but leave the third power, that of the churchwardens and overseers with their attendant officers in full efficiency, acting as mediators and guardians of the people, and you will ensure, as the necessary result, not only the prompt execution of duty, but the certainty of its being fully attained. It is in the wholesome and correct exercise and working of this system as at present established, where all parties are jealous of each other, that you have an increase, but I trust a just, a legitimate, and by no means an inordinate increase in the duties of coroner." That is my opinion.

112. *Colonel Wood.*] But, Mr. Baker, all this relates entirely to the giving notice of sudden death?—It relates to the duty generally.

113. If the coroner is informed, either by a parochial constable or by the paid police, of a sudden death, the discretion rests with him as to giving the notice?—I am putting the case; supposing the policeman has neglected his duty during the night in the station-house, he would probably be disposed to cover that for his own sake, and he would give no information to the coroner.

114. Then it relates only to the giving notice?—It relates to the whole matter altogether. If you were to remove it from the overseer, he would lose all power over it.

115. *Mr. Wakley.*] If a suspicion had existed that a party had died at the station-house through neglect or ill-treatment, would it work well for the coroner's office to allow the authorities at the station-house to have the marshalling of the witnesses and summoning of the jury?—Certainly not.

116. *Mr. W. Williams.*] In cases of sudden death, is there generally a disinclination manifested on the part of the relatives of the deceased to have an inquest held on the body?—Very often; and there is great difficulty in the case of an exceedingly pauperized neighbourhood in exercising any discretion whatever. The very person who would come to you and state that it was not necessary to hold an inquest, would be the very person who would wish to cover some default of his own and prevent inquiry.

117. Is it your opinion that the combined influence of the parochial authorities and of the police is necessary?—It is.

118. *Mr. Wakley.*] Do you find that where there is the greatest objection by the relatives to the holding of inquests that there is the most necessity for inquiry?—Very frequently indeed.

119. *Mr. G. Knight.*] By what rule does the constable govern himself in the selection of jurymen in important cases?—He has no power by law, but he exercises his option on the subject; I put a clause into a Bill, which did not pass, as to the amendment of the coroner's law, it having been thrown out in consequence of the difference between the two Houses as to the coroner's court being an open court. It was a clause allowing the coroner to summon that description of jurymen which is contemplated by the Jury Act, in all cases of murder or manslaughter, or great importance; that clause was acceded to; there would then have been power vested in the coroner to get a better description of jury in particular cases.

120. In your opinion, some law is necessary for the government of the constable in the selection of such a jury?—Yes.

121. *Mr. Wakley.*] Do you give the constable any instructions on the subject?—None at all; I consider I have discharged my duty, as far as regards the constable, in issuing my warrant to him; I believe the particular effect is this, that in a case of a person dying under circumstances such as those I have alluded to, he gets a better description of jurymen generally than the ordinary juries that coroners have, by his applying to the parochial officers; supposing there was a case of riot, or a case of death under very peculiar circumstances, he generally does so, and has his authority to summon a better description of jurymen.

122. *Mr. G. Knight.*] You believe he would endeavour to do so, and that would be his general practice?—Yes.

123. *Chairman.*] Have you any reason to complain of the way in which the constables exercise their power?—No; they are amenable to their overseers; and if I were to make a complaint to their overseers, they would be discharged for their misconduct.

124. *Mr. G. Knight.*] You said you still thought an additional rule or clause would be necessary for their government?—I thought it would be useful; the way I put it was that of giving the coroner discretion of summoning a particular jury when he required it.

125. You

125. You have found no dissatisfaction?—No.

126. Colonel *Wood*.] There is no fee to the constable, then?—Yes, I think there is; “Constable 1 s.”

127. Mr. *Wakley*.] Is that to be paid to a constable who is a salaried officer?—Not under the amended schedule; I suppose it is not.

128. Supposing this case occurs; if a policeman has made an effort to save the life of a person, has plunged into the water to save an individual from drowning, and has not succeeded, but brought the body ashore dead, and if he be summoned to attend an inquest on the following day, can you, under the present schedule of the magistrates, pay him for his exertions to save the life of the party, or for his attendance at the inquest?—No; for he does not lose his day’s work.

129. Can you pay him any thing for any one of such services?—No, certainly not; it says, “These allowances are to be paid only to such witnesses who it may appear to the coroner have suffered by loss of time, or by expense in attending the inquest.”

130. Has the police constable, after having performed such services, sometimes to attend the inquests when he ought to be off duty and in bed?—Yes, no doubt.

131. Colonel *Wood*.] You think that he ought to be remunerated for his attendance?—Yes, a moderate remuneration.

132. Sir *T. Fremantle*.] On what grounds do you think that a policeman, a salaried officer, should be paid for occasional services; should not that be a matter of arrangement by the heads of the police establishment?—I should say that would be better still.

133. What reason have you to suppose that such arrangement is not made?—I have sometimes had applications made to me by the police.

134. You feel yourself precluded?—Yes; I think yours would be a better arrangement considerably.

135. Did you state, in answer to a previous question, that it was matter of regret that the coroner had not the power of giving a reward to any policeman who had exerted himself for the preservation of human life?—No, I did not express that there was any regret of the sort; I should never wish to have such power as that.

136. Mr. *Wakley*.] What is paid in such cases to an ordinary person, a person having no specific duty to perform?—That is 4 s.: “To the person or persons finding the body apparently drowned, for bringing it on shore and giving information thereof to a constable or parish authority, a sum (to be divided among such persons at the discretion of the coroner) not exceeding 4 s.”

137. Sir *T. Fremantle*.] You do not think that a policeman ought to be paid that 4 s.?—Well, I think it is much better in the hands of the police to remunerate them than have any power of that sort.

138. Do you consider that a policeman ought to have such fee for bringing a dead body on shore?—I think, in the case of rescuing a person from drowning, he ought.

139. That is not the question; it is conveying a dead body; we are asking as to a particular fee; do you consider that a policeman paid and salaried, that he ought to have such fee?—No, certainly not.

140. Lord *Eliot*.] Do you think it is part of the policeman’s duty to leap into the river and expose his life?—No, certainly not.

141. Sir *T. Fremantle*.] I should like to ask Mr. Baker what objection he finds to the schedule of allowances as now in force in the county of Middlesex?—I think it is principally as to the jury, there being no allowance as to the jury; there being allowances in the other counties to the jury, and none in Middlesex, and the allowance having been before made to them; not that it is a very great hardship on them, but it is to a certain extent.

142. State any other particular in which you consider the schedule defective?—I merely mention that there is no allowance made as to estreats of deodands which other coroners have allowed: I find in page 28 of the Returns there is one there; some more in page 112. There are three different accounts to be made out by the coroner required by law, one goes to the Queen’s Remembrancer; another to the Commissioners of Public Accounts, and the third to the Treasury;

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and in each case made before a magistrate, for which he pays money out of his pocket, which he has no power of recovering back ; there are some instances also in pages 113, 118 and 119 of the Returns.

143. Do I understand you, that in cases of deodand the coroner dispenses money out of his own pocket which he is not able to recover back ?—Yes ; I find no positive law to enable him to recover it.

144. I think you have said you frequently receive notice of a death from a police constable and from a parish constable ?—Yes.

145. Have you in those cases allowed the expense to one or to both ?—Only to the parish constable.

146. And since the alteration of this order, you have not allowed the fee to the police constable ?—I have never allowed any to the police constable ; I always considered him as a paid officer ; the schedule originally stated, “ that these allowances are only to be paid to those who have suffered a loss of time.”

147. Perhaps you will state the alteration that is made in the schedule to which objection has been made, “ nor to domestic servants, nor to constables in the metropolitan police force, nor to parochial constables or officers receiving regular salaries or wages ;” that is the objectionable part ?—The difficulty is this : I know in my own parish the salaries have been regulated with reference to the other duties, and that they used to charge these fees, and they were paid independently of their salaries.

148. You make a distinction between the officers whose salaries are sufficient to remunerate them for the whole of their time, and others where that is not so ; and with reference to the latter class of officers, you think they are entitled to their fees for such services, having no salaries ?—Yes.

149. And have you found yourself restricted from paying the fee to such officers ?—Yes, latterly ; but the magistrates have relaxed it very much.

150. *Mr. Wakley.*] Have they relaxed it by any printed regulation, or only in practice ?—Only in practice.

151. As to beadles, have you paid fees to them ?—When they have been constables. I am telling the Committee what the operation of this has been. In some instances the beadles used to perform this duty, but finding that they were not to receive any emolument for it, being salaried officers, they have thrown the duty upon the unpaid constable.

152. *Mr. W. Williams.*] Since the amended schedule has been in operation, what alteration has that schedule produced practically on your payments to the constable ?—I think, practically, it has hardly done any thing ; I did abstain from certain payments at first, but afterwards I came back to them, finding that by the return there was no officer who came within the fair interpretation of it ; I did not consider them salaried officers.

153. *Mr. Wakley.*] You mean salaried constables ?—Yes.

154. *Sir T. Fremantle.*] You have made allowances to them ?—Yes.

155. Have your accounts ever been disallowed in consequence of your having so done ?—I think not, since I have paid them lately ; I did not make them at first ; afterwards I did make them.

156. Since you have taken on yourself to make them, do the magistrates disallow them ?—They were paid in the last account but one, and in the last account.

157. Did you make any representation to the magistrates on that subject ?—Yes, when I was before them I stated that there were no paid constables in the parish, and that all the other parties stated they had very moderate salaries for distinct purposes.

158. What answer did they make to that ?—There was none.

159. Do you think there is a disposition on the part of the magistrates to relax in the strict rule on this point ?—I cannot say ; I hope so.

160. At all events you think the matter should be settled more advantageously ?—Yes, it is placing the coroner in a situation where he has no means of judging.

161. Have you ever found the magistrates indisposed to listen to any suggestion on the subject of coroners' allowances ?—Some of the magistrates have taken an erroneous view of the situation of the constables, and I think that the order was made from a mistaken knowledge of their situation ; that is the only complaint.

162. *Mr.*

162. *Mr. Wakley.*] Is that order altered?—No; it strikes me they have taken a wrong view of it. There is great complaint on the part of the constables being salaried officers receiving a small salary for other purposes; they say, “It is very hard on us that you object to it.” I think the order was made erroneously by the magistrates in that respect.

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163. You say practically you have departed from it?—Yes.

164. *Mr. W. Williams.*] Since the amended schedule has been in operation, do you consider you were prevented by it from paying the beadle as you had done, according to the provisions of the first schedule?—No; when I found a beadle only receiving a small salary, such as at Bow receiving a gratuity of 6*l.* for keeping a fire-engine, I have paid him as before.

165. Though, by the provisions of the amended schedule, you were ordered not to pay any salaried officer?—Exactly so.

166. Are your accounts paid without objection, now that you pay the beadle as before?—The last account was paid, and the next is in a course of payment now. From a communication I have had with the magistrates lately, there is no dispute. Both *Mr. Wakley* and myself attended the magistrates lately at a special court for going into our accounts, and no question arose on this point whatever; and my account referred to a beadle who had some trifling salary before for other purposes than those connected with the coroner's duty.

167. Are you required to swear to the accuracy of these accounts?—Yes.

168. You do not consider the new schedule prevents you from paying the beadles?—I considered I acted conscientiously and properly.

169. Though they are salaried officers?—I have exercised my discretion in the best way I could, under circumstances of such extreme difficulty.

170. Now, do you consider the provisions of the amended schedule prevent your paying a constable in the receipt of salary or wages?—If a constable is in receipt of salary I should not pay him.

171. You should not?—I should not.

172. *Chairman.*] In the report of the justices of the peace of Middlesex, it is stated, that the magistrates claimed the power of deciding whether the inquests held were necessary or unnecessary, and altering or withholding the coroners' fees accordingly; under what power do they act; for the Act of 1st Victoria, cap. 68, only states they have the power of altering or varying the schedule; but by what Act have the magistrates that power?—I do not believe it is under any Act of Parliament; it is by some dictum laid down by one of the judges, that the magistrates have the power of questioning whether the inquest has been duly held.

173. You state that this power was granted, not by virtue of any Act, of Parliament, but by the dictum of a judge; could you state in what case that dictum was laid down?—In 1 Hale's Pleas of the Crown, 382; it forms part of the report.

174. *Mr. Wakley.*] When did you first experience a difficulty in passing your accounts before the justices of the peace?—I think not until after your election; *Mr. Stirling*, down to the period of his death, was clerk to the magistrates; I always framed my accounts agreeably to his directions, and they always passed without any difficulty whatever.

175. Had you ever a deduction made from your account until after my election?—Not any.

176. Had any item ever been struck from your accounts?—No; I prepared my own account in the first instance according to what I conceived to be the law with regard to mileage; *Mr. Stirling* told me that he had always been allowed in a different way; I was told by him to prepare my accounts in the same way as he did; that it had always been allowed in respect of other cases; that accounts had been paid in that way down to the present period; but yesterday *Mr. Wakley* and myself had an interview with the magistrates in sessions, and a distinct understanding was come to with reference to the mode in which the mileage should be charged in future, and I apprehend that no difficulty whatever will arise on that subject hereafter.

177. *Lord Eliot.*] How are they to be charged in future?—Where you hold two inquests in one place, you are only to charge for one; and if moving from one place to another, to charge from the place you are moving from.

178. *Mr. Wakley.*] State what difficulties you have experienced since the last election of coroner for the county?—The accounts having been referred back upon points which had no reference to me. There was delay in payment; it was in



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consequence of some inquests being held by deputy, which caused the whole of the accounts to be referred back to the committee, and subsequently the delay; and the mileage in one or two instances has been reduced on the principle that I have mentioned, of not being allowed with regard to two cases where there was only one journey.

179. When were charges first brought against the coroners that they had held unnecessary inquests?—I do not know that I am prepared exactly to give an answer to that; it was subsequent to Mr. Wakley's election; about six or seven months afterwards, I think it was.

180. It is stated in the report of the magistrates that they attribute the increase of inquests to the fees paid to the constables; does it appear to you that the fee has been taken from the constables for the purpose of diminishing the number of inquests?—Yes, that I think is the only motive.

181. That being the case, according to your opinion, I have to ask whether any of your inquiries have been quashed on the ground that the inquest was unnecessary?—No, I have not held fewer inquests.

182. Have you been disallowed payments for inquests on the ground that they were unnecessary?—Certainly not.

183. Colonel Wood.] When was the last election of coroner?—In February 1839.

184. Was that previous to the 1st of Victoria?—No, long subsequent; the 1st of Victoria was the 15th of July 1837.

185. By the 1st of Victoria it was that discretion was given to the magistrates of establishing the schedule of fees?—Yes.

186. Then the difficulties you have met with in the allowance of your accounts relates to that period?—There was no difficulty in any of the payments I made under the statute of 1st of Victoria till after Mr. Wakley's election took place; the accounts were all passed during that time; during Mr. Stirling's lifetime the accounts were always framed according to the mode he required them, and, being sanctioned by vouchers, they were allowed.

187. Do you mean that after his election those accounts raised a difficulty?—Yes, I think the difficulty arose very shortly after that period.

188. Mr. Aglionby.] What was the date of Mr. Stirling's death?—January 1839.

189. Colonel Wood.] You stated that difficulties had arisen relative to holding inquests by deputy; were any of your inquests disallowed in consequence?—I have never held inquests by deputy; I have always attended to every case myself; I considered it to be the duty of the coroner to do so, and I have always done so; and when I have been unable to perform the duty myself, I have requested Mr. Stirling to do it for me.

190. Mr. Wakley.] Do you consider that the county coroner has power to take inquests by deputy, or to appoint a deputy?—The power is given to those who act under charters and grants from the Crown; I never knew an instance of a county coroner having the power.

191. Do you happen to know of your own knowledge if your predecessor, Mr. Unwin, took inquests by deputy?—Constantly; for he was himself labouring under great bodily infirmity, and his son used constantly to hold inquests.

192. Do you know if Mr. Stirling used to take inquests by deputy?—I believe Mr. Bell used to hold them for him; for I never knew an instance of being called on by Mr. Stirling till the last week before he died.

193. Do you happen to know if any objection was raised to the payment of the expenses incurred from taking inquests by deputy till I came into office?—Not any.

194. Mr. Aglionby.] Can you inform the Committee what was the nature of the appointment of deputy in either of those cases you have mentioned?—My answer is this; I consider it no appointment of deputy at all; it was an act done in the case of Mr. Unwin by his son acting for him, the inquisition being signed by the father, he not being present; it is not an appointment by him, it is merely a permissive sort of authority.

195. Mr. G. Knight.] Was the father ill at the time from infirmity?—Yes, by reason of infirmity that he permitted his son to hold inquests.

196. Will you state the difference between the office of coroner for the county of Middlesex and the office of coroner for the Duchy of Lancaster, as to the appointment of deputy?—I believe the words of the grant to the Duchy are "*per se ipsum, vel per sufficientem deputatum*;" I think those are the words of the ancient grant.

197. Did

197. Did you not speak of other occasions in which it has been done by deputy?—Mr. Bell has performed it for Mr. Stirling; the inquisition appeared to the court to be the inquisition of Mr. Stirling.

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198. Then that must have been illegal from beginning to end?—Certainly; it could not hold valid for a single moment; I have no doubt that Mr. Bell has gone 20 miles into the country and held inquests for Mr. Stirling, and Mr. Stirling has signed his name to that inquisition, stating that he had held that inquest.

199. In person?—Yes.

200. Mr. *Wakley*.] With regard to the appointment of deputies, do you consider, in a coroner, that it would be a convenience to the public for the coroner to have the power of appointing a deputy?—I think it would be useful in many cases; I see no reason why the Duchy of Lancaster should have powers given to the coroner which do not extend to other coroners.

201. Have the coroners of particular liberties and franchises power to appoint deputies?—Several of them have, no doubt, that power: “the Coroner of the Admiralty may appoint a deputy, but this power is conferred by his patent, which empowers him to act *vel per se, vel per sufficientem deputatum*.”

*Martis, 2<sup>o</sup> die Junii, 1840.*

MEMBERS PRESENT:

Colonel Thomas Wood.  
Mr. Wakley.  
Mr. Gally Knight.

Mr. William Williams.  
Lord Eliot.  
Mr. Thomas Duncombe.

LORD TEIGNMOUTH IN THE CHAIR.

*William Baker, Esq.*, again called in; and further Examined.

202. Mr. *Wakley*.] ARE there any points in the evidence you gave on Tuesday last which you wish to alter or explain?—I have made such alterations in the copy of the evidence as I think make it clearer; I have not altered the sense in any respect.

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203. Will you refer to question 48; does your answer there allude simply to the non-payment of the juries?—It alludes to the dissatisfaction expressed in consequence of no remuneration having been made; and the juries are generally dissatisfied.

204. Mr. *G. Knight*.] Do you consider that the public are dissatisfied?—There is one portion of the public which considers that the allowance they got was improper,—that an improper use was made of it; but I never found any instance of that kind.

205. Upon the whole, should you say, that the public are of opinion that the discontinuance of the payments to juries is or is not a good measure?—I am satisfied that the public are of opinion that some allowance should be made; I am of that opinion; and I ground that opinion upon looking over the returns, where I find an allowance has been made in most other counties in such cases.

206. Mr. *Wakley*.] Do you find in the returns, that in all the counties that surround Middlesex, an allowance is made to the juries?—I will state the returns.

207. Refer to the returns and state what they are?—It would be better if I were to make a summary of these returns.

208. Should you find any difficulty in stating the allowances made in Surrey, Kent, Bucks, Hertfordshire, Essex and Berkshire?—There is a schedule in Essex; but Mr. Wasey Sterry says, “In the liberty of Havering-atte-Bower there is no schedule made, the only fees paid by the coroner being those to medical

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witnesses, pursuant to 6 & 7 William IV., cap. 39, the constable being paid 6 *s.* for summoning the jury and 5 *s.* for attending at the inquest, by the justices of the peace of the liberty, at the Easter quarter sessions, out of the liberty-rate."

209. Is there any allowance to the jury?—No, there does not appear to be any allowance there.

210. What sum is allowed to the constables in Essex?—Five shillings for summoning the jury and attending the inquest; and for summoning witnesses, in case the person serving the summons has to go out of his parish, 3 *d.* each mile travelled in going to serve the summons and returning.

211. You conceive there is no allowance to the jury?—There appears to be none.

212. State what sum is allowed to the juries in the county of Surrey, and then what to the constables in Surrey?—There is an order of sessions in Surrey, "That the allowance to the jury attending an inquest be increased from the sum of 10 *s.* 6 *d.* to 12 *s.*"

213. How much to the constable?—For giving information to the coroner, summoning the jury and attending the inquest, 8 *s.*, and 2 *s.* 6 *d.* for any adjournment day; and 3 *d.* a mile to and fro for every mile he shall be obliged to travel in summoning the jury and witnesses beyond two miles.

214. Now, refer to the county of Buckinghamshire?—To the jury not exceeding per head 1 *s.*

215. What is the allowance to the constable?—To the constable for informing the coroner of the death, not exceeding 6 *d.* per mile; for his services and expenses in summoning the jury and attending the inquest, 5 *s.*; for travelling expenses in summoning the witnesses, at per mile, 6 *d.*

216. What is the total to the constable, exclusive of mileage?—Five shillings and sixpence.

217. Now, take Kent?—There is no allowance to the jury in Kent.

218. What is the allowance to the constable?—To the constable for going to and giving notice to the coroner, not exceeding 2 *s.* 6 *d.*; summoning the jury, and attending the inquest, 5 *s.*; travelling expenses, beyond four miles, 4 *d.* a mile out.

219. What is the total to the constable, exclusive of the mileage?—Seven shillings and sixpence.

220. The next is Hertfordshire, state what is the allowance to the juries there?—There does not appear to be any allowance there to the jurymen.

221. What is the allowance to the constable?—If residing not exceeding four miles of the coroner, for giving information to the coroner, 2 *s.* 6 *d.*; beyond that distance, 3 *d.* a mile in and out.

222. How much for summoning the jury?—For summoning the jury and witnesses, and attending the inquest, 5 *s.*

223. What at the adjournment day?—Two shillings and sixpence.

224. What is the total allowance to him, exclusive of mileage and the adjournment day?—Seven shillings and sixpence.

225. So that it cannot be less, in any of the cases you have mentioned, than 7 *s.* 6 *d.*?—No.

226. Now, Berks?—The allowance to the jurymen, in Berks, is 1 *s.* a day each, and to the constable giving notice to the coroner, per mile out, nothing; for returns, 6 *d.*; summoning the jury and attendance at inquest, per day, 5 *s.*

227. What is the total to the constable?—Five shillings and sixpence.

228. Exclusive of the mileage?—Yes.

229. Did you find the payments made to the constables, under the first schedule, and which very nearly resemble those you have now read from the return before The House, satisfactory to those officers?—Yes, I did.

230. Do you consider, by the amended schedule, that you are precluded from paying the beadles?—That is a mixed question, which I wish to explain generally to the Committee, arising from the words in the amended schedule; the interdict being to the parochial constables, or officers receiving regular salaries or wages, I cannot understand what is meant by the words "officers receiving regular salaries or wages;" I am myself an officer receiving a regular salary; I cannot conceive that it could allude to the vestry clerk, the office in respect of which I receive a salary; I cannot conceive that it relates to the collector of the rates, who also may receive a salary. Then it becomes necessary to consider to whom it does relate, and that constitutes the difficulty; the coroner is at a loss to know how

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how to act with respect to it; the beadle says, "It is true I receive a salary, but it is for purposes totally unconnected with the duties of coroner;" and, to prove that such has been the case, I will put in two bills from the constable of my own parish, who received a regular salary for his duty as constable, but at the same time made specific charges for his duty in attending upon the coroner.

231. *Chairman.*] What date was it?—In the year 1834, in July and August, the sum charged for summoning and refreshment to the jury is 13*s.* in both these bills, so that I can hardly suppose "that an officer receiving a regular salary or wages" could relate to such a person; but it may probably intend to relate to the police constable, who receives a salary, and whose whole time is dedicated to the public.

232. Does not it appear, from the returns relating to coroners, ordered by the House of Commons, that this inhibition, in regard to the payment of officers receiving regular salaries or wages, is confined to Middlesex and the city and liberties of Westminster?—Yes, I believe there is no other inhibition in any other county to that effect; it exists only in Middlesex.

233. Then what particular reason was there for such an inhibition in those two districts?—I cannot ascertain the motives of the Middlesex magistrates; but I consider it to be for two reasons; first, that they might suppose inquests were called for unnecessarily by the beadle, and another, to diminish the expense to the county.

234. *Mr. Wakley.*] You stated, in your evidence on Friday, you believed that it was to diminish the number of inquests?—Yes.

235. But you say you have not practically altered your payment in consequence of that regulation?—Only very partially; there may be a case where a beadle has a salary riding over all his duties.

236. How is the salary of the beadle derived?—From the poor-rate or the church-rate.

237. Does not the order of the Poor Law Commissioners declare that there shall be no payment for inquests made out of the poor-rate?—Exactly so.

238. Then, is the beadle paid for his services, or is he not, in respect of the inquest?—I consider not by his salary; it is totally unconnected with it; it is that which constitutes the difficulty of the order.

239. Does not the Act of Victoria declare, that the payments which have been made out of the poor-rate have been paid without sufficient legal authority?—Yes, it does; I take it that the words "salaried officer" can only mean constable, or an officer; it is *ejusdem generis*; it must mean somebody of the same description.

240. Your construction is, that the word "officers" refers to officers of the description previously mentioned; in other words, to constables?—Yes, I am driven to that construction.

241. *Mr. G. Knight.*] At what period, and how, did the discontinuance of the payment to the juries on inquests begin?—The Poor Law Commissioners having ordered that no further payments of that sort should be made out of the poor-rate, that gave rise to the 1st of Victoria.

242. They having done that, the 1st of Victoria empowered the coroner to make discretionary payments till the schedule of the magistrates should come out?—Yes, during which period I allowed the jury 12*s.* in each case.

243. When the schedule of the magistrates of the county of Middlesex came out, by that schedule all future allowances to the juries on inquests were discontinued?—Exactly so.

244. And, in point of fact, none have since been made?—None have since been made.

245. You state, that in your opinion it would be better if they had some allowance?—Yes, in the neighbourhood like that where I hold the inquests, I thought it a very salutary payment, because it has been generally well applied; I observe one of the coroners speaks of very improper conduct on the part of the jurymen,—and he found benefit from its being discontinued,—that some of the jury got intoxicated; but I have never found any thing of that kind.

246. Do you perceive, that, in referring to the returns relating to the coroners laid before the House of Commons, there is a very remarkable variety in the schedules of the magistrates of the different counties?—Yes, I do; and I think it is one of the great objections to the Act of Parliament; because, where the allowances are made in some parishes and not in others, or in some counties and not in others, the parties become dissatisfied.

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247. In whose discretion should you say those payments had better be vested?—I can only say that it is difficult to decide; there may be reasons in the different counties where the alterations take place.

248. What should you say in your own county of Middlesex?—In the county of Middlesex, I should say, that I see no objection to its being vested in the magistrates themselves, as I think they have the most general knowledge of the whole county.

249. Your opinion is, that the Act of Parliament ought more clearly to define the rate of charge?—Yes, I think that it would be better to have a general law fixing the allowance under the two heads, to the constables and the jury.

250. Mr. *Wakley*.] Do you think that the judges who regulate the payments to witnesses and juries in the superior courts would be the least likely to be influenced by personal motives?—There would be no objection to the judges having the allowance to the juries and officers under their control.

251. And if any alterations were required at any time, could not the judges of assize make the alterations on representations being made to them by the proper authorities?—No doubt of it.

252. Did you in October last receive a notice from the Sessions-house to this effect—[*handing a paper to the Witness*]?—Yes, I did.

253. Read it?—“Sessions-house, Clerkenwell, 22d October 1839. Sir, the committee for accounts and for general purposes wishing for explanation as to the necessity of holding inquests in several cases included in your last account (a list of which is forwarded on the other side), I am directed to request your attendance at a meeting of the committee on Friday next, at eleven o'clock, at this place. I have the honour to be, sir, your most obedient servant, Chas. Wright. Thomas Wakley, Esq. M.P.”

254. Mr. *G. Knight*.] Was that at Clerkenwell?—Yes, I have received similar notices once or twice.

255. Mr. *Wakley*.] You say that difficulties had occurred in the accounts in consequence of holding inquests by deputy?—Yes.

256. Had the holding of inquests by deputy occupied the attention of the court at the time you received that notice?—No, certainly not at that time.

257. Colonel *T. Wood*.] Are you speaking from your own knowledge or hearsay, or what; how do you know what has occupied the attention of the court?—I believe there was no question about the deputies until after that period; the 3d of February 1840 was the date of it.

258. Mr. *Wakley*.] Did you attend the court in consequence of that notification?—Yes, I did.

259. Were any questions put to you as to your reasons for holding inquests in particular cases?—Yes, there were; and I gave the full particulars, and read over the depositions to the magistrates who were present.

260. Did you enter any protest against the right of the magistrates to institute that examination?—I considered that the committee had no right to put any such questions; but I did not make any protest; I wished to give every information; I wished no part of my conduct to be screened from inquiry, and therefore I was rather anxious to covet the inquiry than prevent it; I did not protest against their right, although I considered that the committee had no power to make such an examination.

261. You did not complain of the course that had been pursued in instituting the inquiry?—No, I think not.

262. Had you been, previously to that time, charged, in open court, by the magistrates, with having taken unnecessary inquests?—Yes, I believe I had; and I think, upon recollection, I read a long speech I made to the meeting upon the subject, and that may let me more into the secret of what I did say.

263. In consequence of that investigation, were any inquests, or any charges for inquests, erased from your accounts?—Not any.

264. Mr. *G. Knight*.] Then, have you reason to believe that the magistrates were satisfied with your explanation?—Yes, exactly so.

265. Mr. *Wakley*.] Did you consider that the magistrates had a legal right to examine you as to the exercise of your discretion in determining the necessity of holding inquests in particular cases?—I thought they had a right to examine me as to my accounts, which involved that question to a certain extent, inasmuch as the fee depended upon the duly taking the inquest.

266. Mr.

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266. Mr. G. Knight.] Am I to understand you to say that you conceived that the magistrates, in quarter sessions assembled, had that right?—Yes, I conceived they had, with respect to the payment of the fee.

267. Mr. Wakley.] With respect to the payments and disbursements?—Yes.

268. Is there any Act of Parliament, with which you are acquainted, that empowers magistrates to question the discretion of the coroner, whether he will hold inquests in particular cases?—Not any that I am aware of.

269. Mr. G. Knight.] Are there not many other portions of the coroner's office which are exercised, without their being designated in any Act of Parliament?—Yes, according to the common law of the land, and the power originally given, of which the Acts of Parliament are only in affirmance.

270. Mr. Wakley.] Do you draw any distinction between the words of the Act of George II., "duly taken," and the words used by the magistrates, "necessarily taken"?—It is rather difficult to know the distinction between the two; because "necessarily" and "duly" would seem almost to imply the same thing; to be duly taken they must be necessary; I do not see any distinction myself.

271. Between necessarily and duly taken?—Yes, duly taken includes the necessity, at least so the court considered.

272. You do not consider that the words "duly taken" refer to the forms of law prescribed by the court being complied with, such as having 12 jurymen, and having the jury duly summoned, and the court properly opened and closed, and all the proceedings there duly exercised according to the due forms of law?—I understand you; there is a distinction between the forms used and the discretion used in holding the inquest; I apprehend the words "duly taken" would apply to the business being duly conducted according to the legal forms, and not to involve the question of the necessity of holding the inquiry; but still the court did not so consider it.

273. In the Act of Victoria is it not expressly declared that the coroner shall be allowed to pay the fees and allowances and disbursements which are named in the schedule issued by the magistrates, at any inquest he may take on any dead body?—Yes.

274. And is not the coroner compelled, immediately after the termination of the proceedings at any inquest, to pay all expenses reasonably incurred in and about the holding thereof, not exceeding the sum set forth in the said schedule?—Yes, the Act is imperative in that respect.

275. Is not the mode of punishing the coroner, if he does wrong in holding an inquest, expressly pointed out in the Act of George II.?—Yes; he may be punished by indictment for extortion; this is the fourth section of that Act of Parliament: "That no coroner to whom any benefit is given by this Act shall, by colour of his office, or upon any pretext whatsoever, take for his office doing, in case of the death of any person, any fee or reward other than the said fee of 13s. 4d., limited as is aforesaid by the said Act made in the third year of the reign of King Henry VII., and other than the recompense hereby limited and appointed, upon pain of being deemed guilty of extortion."

276. Mr. G. Knight.] If so proved, how is he to be proceeded against; does it say there?—No, it does not.

277. Mr. Wakley.] Do you consider that any coroner could hold his office with any comfort or peace of mind, if he believed that, after he had made those payments at inquests, the magistrates could exercise a discretion over him, and disallow them?—I think it would not be right that the magistrates should exercise a discretion over him; he is the only person competent to exercise it, being present at the time; the subsequent discretion exercised by the magistrates must be *ex post facto*, and without any means of knowledge.

278. If the coroner, after having held an inquest, were to neglect to pay the expenses incurred by him, would he not be liable to be indicted for a misdemeanor?—Yes, and liable also to be sued for the fees.

279. Colonel T. Wood.] If the magistrates unjustly withhold the fees that have been paid by the coroner, what remedy has the coroner?—If the justices refuse to allow the fees to the coroner, the only mode of compelling them to make the allowance or of trying his right to such as may be questioned is to apply to the Court of Queen's Bench for a *mandamus*.

280. Mr. Wakley.] Upon whom would the costs of the proceeding fall?—That would depend upon circumstances; if the application failed, the cost would fall upon the coroner.

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281. Colonel *T. Wood*.] What is to prevent him suing them for the debt?—I do not apprehend that debt would lie in such a case.

282. Mr. *Wakley*.] Would not, in the case of such a proceeding, the coroner have to fight with his individual purse against the county rate?—Yes, certainly.

283. Has not the coroner important duties to discharge connected with prisons, lunatic asylums, and workhouses wherein relief is administered to the poor, in which he may be brought into frequent collision with the magistrates?—No doubt; all cases of inquests held in prisons, and all cases of inquests held in lunatic asylums, would necessarily involve the conduct of the magistrates to a certain extent.

284. Do you consider that it is a sound state of the law for the judge of a court to be dependent for the payment of the fees which may arise from the holding of inquests connected with the supervision of persons who are to be the auditors of his accounts?—I think, as the coroner has the ulterior power of application to the Court of Queen's Bench for the enforcement of his demand, he could never be improperly overruled by the conduct of the magistrates.

285. You believe that he would find his remedy in the superior courts?—Yes, I never found any practical difficulty.

286. Are you acquainted with the case in East's Reports, of the King against the Justices of Kent, where the coroner did apply to the court for a mandamus, when his charges for the holding an inquest in the case of a sudden death had been disallowed?—That was the case of a person who held two inquests in the same town.

287. Do you consider that the coroner found his remedy there?—I consider that the observation accompanying the adjudication of the judge at that time was not called for; it was not sound law, and he expressed an opinion that was extrajudicial, and without all the facts of the case before him.

288. Who was the judge in that case?—Lord Ellenborough, I think it was.

289. Mr. *G. Knight*.] Do you consider, that, according to the present state of the law, the county coroner is at liberty to hold inquests by deputy, or not?—I consider that the county coroner is not; but the Legislature has recently given that power to the coroners in municipal corporations; it will be found in the Act passed in the 6th and 7th of William IV., cap. 105, sec. 6, intituled, "An Act for the better Administration of Justice in Boroughs;" power is there given to the coroners in municipal corporations to appoint a deputy, being a barrister-at-law or an attorney, in case of illness or unavoidable absence; two justices and the council are to certify the necessity, and that certificate is to be read by the deputy coroner at the inquest.

290. Are you of opinion that such an alteration would be an improvement in counties?—I can see no reason why the same power should not be given to the county coroner; in fact, I think there are reasons for its being so given, which apply more forcibly than to municipal coroners.

291. Mr. *Wakley*.] Do you believe, from your own experience, it would be as convenient to jurymen as it is to the coroner himself?—Yes; not only the jurymen's time might be saved, but the expenses of the county also, by procuring a certificate, which would prevent the coroner going the distance of a great many miles, and then the two justices who had formed an opinion upon the subject would have ascertained there was ground of unavoidable absence, and would certify.

292. Have the coroners in particular liberties and franchises power to appoint deputies as well as the coroners of municipal corporations?—Yes, they have; and I can see no reason why a similar power should not be granted to the county coroners.

293. Have the sheriffs power to appoint deputies?—Yes, sheriffs have the power to appoint under-sheriffs.

294. What is the mode of appointing them?—The under-sheriff is appointed by the sheriff.

295. Has he by statute all the powers and authorities which the sheriff himself can exercise?—He has.

296. Mr. *G. Knight*.] In cases of inquests, in whom does the power lie of selecting or appointing the jury?—The constable, the parish officer.

297. Mr. *Wakley*.] If the amended schedule were to be repealed and the first schedule again acted upon in this county by the coroners, do you believe that it would work with perfect satisfaction, with the single exception of its not awarding



awarding payment to juries?—Yes, I do; there is no exception to it then, excepting the additions I have already suggested in my evidence.

298. Have you made any representation of that kind to the magistrates?—Only at the different meetings I have had with them upon the subject; I have made no written communication.

299. Could you furnish the Committee with the names of any beadles whom you have discontinued paying in consequence of the amended schedule?—I do not know that I can give their names at present.

300. Was any report ever made as to the coroners by the commissioners appointed by his late Majesty to inquire into the expenditure of the county-rates?—Yes.

301. In that report did any thing appear relative to the fees paid by the coroner?—Yes, in page 39, the commissioners' opinion is expressed as follows:—"The fee of 20*s.* for taking an inquest, however long an inquiry may last, is certainly inadequate to the service; the allowance per mile for journees is also rather scanty, and yet a very unnecessary expense is incurred under this head, in consequence of the great distance which a coroner has sometimes to travel. In a district of reduced extent (20 miles is suggested as the limit) a fee of 40*s.*, without travelling expenses, would be satisfactory to the officer, and we think not unfair to the public. We are also of opinion that there should be an allowance to witnesses attending before the coroner. We think that the coroner should have the power of making an order upon the treasurer of the county for a fee of 1*l.* to be paid to every medical practitioner called upon to attend an inquest. He ought also to be empowered to make an order for the same allowance for loss of time and mileage in case of other witnesses (when taken four miles out of the town or place in which they live), as would be paid them for attending at the sessions. (signed) Henry J. Stephen, Thomas Law Hodges, Charles Shaw Lefevre, Fortunatus Dwarris. 22d May 1837."

302. *Chairman.*] It is stated that deaths take place on which inquiries ought to be set on foot, and on which no inquests do occur; is that the fact; and if it is the fact, should you attribute it to the existing state of the law?—It may be as much attributed to adventitious circumstances; you cannot have a law perfect in all its parts; there are no means of getting information by any additional law that I can devise; some cases may be omitted, either from parties secreting the information, or by untoward circumstances; and such improper conduct on their part may prevent the knowledge of any case coming to the coroner; but there is not any law that could make it better than it is, that I am aware of.

303. *Mr. Wakley.*] Are the parties who sometimes have a direct interest in preventing the inquiry the proper parties to give notice to the coroner?—No, certainly not; many persons, where death occurs in a house, may have reasons for not giving the information to the coroner by having an interest in his property, or some other motive.

304. *Chairman.*] Would you propose to rectify that defect by any alteration of the law?—No; it is a matter of general vigilance, and, as the police are appointed, I think every thing is done that can be by any positive law upon the subject.

305. Do you think, by offering any additional inducement to the police to exercise more vigilance, that that end would be in a greater degree attained?—I think that the attention of the police having been called to it by the commissioners, that every thing is done that can be done in that respect; I am not aware that they can, without infringing too much upon the liberties of the subject, exercise greater vigilance than they do.

306. You think the giving the police constables greater remuneration might be attended with abuse?—I think it might have that effect.

307. *Mr. Wakley.*] Do you consider that it would operate as a check upon the commission of crime if persons having the legal custody of dead bodies were compelled to give notice to the Registrar of Deaths of the deaths that happen within 24 hours after they occur?—Yes, I think it might; under the Registration Act great improvements have been made in that respect, and the regulations of the registrar-general have been productive of very great good upon that subject.

308. No inquest has been expunged from your account on the ground that it was an unnecessary inquest?—Not any.

309. *Mr. G. Knight.*] In the summoning of juries, is there a uniformity of practice amongst constables?—Yes, I think so; I never find any difficulty in it, or any thing inadequate in the performance of their duty.

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310. What is the course adopted by them?—They go into the particular neighbourhood: suppose a jury is required in a particular part of the parish; they call those most convenient to the particular place, as near to the spot as they can, being a dense neighbourhood; I am now going to hold two inquests in the same parish, and the jury may go a mile; if I appoint one at one time and one at another, there would be two juries.

311. Do you think the constable going regularly through his district as to the appointment of juries would be a better plan?—I have no doubt, in my own parishes, the constable does so; he first takes one class, and then another; but he generally takes them in the neighbourhood the most convenient to the spot.

312. Do you think that the other would be a better plan or not?—Yes; having a due regard to those who have been previously called upon inquests, he does not press the same duty upon the same individual twice over.

313. Do you not think that a selection of persons from the immediate neighbourhood, in the case of a riot, where the passions might be inflamed, and parties implicated, would not be the best means of obtaining the ends of justice?—There is an objection to any persons being summoned upon a jury if they have any pre-opinion on the case; I obviate that as much as I possibly can; but, in many parishes, there are individuals who make it a duty—persons retired from business, and more intelligent men—who make it their duty to attend upon inquests, and the constable very often applies to those persons; they are volunteers.

314. Do you not consider, in some cases of riots, where the passions are completely implicated, that selecting a jury from the neighbourhood might be objectionable?—Yes, I should think so.

315. *Chairman.*] Is it not the case, that persons who press forward upon juries are often the last persons who ought to be received, and who are implicated in the transaction?—Yes, very often.

316. What is the check upon that?—Whenever I see any thing of that kind, I always check it; I think the coroner would be justified in preventing that person being placed upon the jury; I have done that myself.

317. You stated, at the last sitting, that, practically, you did pay all the beadles, in consequence of most of them not being regularly salaried officers?—Most of them I have paid, in consequence of their not being regularly paid constables.

318. You have stated to-day that there are some persons who are not paid?—Not where they are constables, having regular salaries; in Shadwell, there is a man of the name of Deverell; he is a beadle; he receives no salary as a constable, but he has a salary as beadle.

319. *Mr. Wakley.*] Do you pay him?—Yes, I have latterly; but I have some doubts whether the particular law of the magistrates would not apply to his case; I have paid him some times and not at others; I did not pay him at first, but I did afterwards; he said his salary did not apply to that duty.

320. Have your payments to him, since the amended schedule was made, been allowed in your accounts by the magistrates?—They have.

321. *Chairman.*] Has not this inhibition of the Middlesex magistrates as to the constables or officers receiving regular salaries or wages become a dead letter?—Yes, I think it has.

*George Stripling, called in; and Examined.*

*George Stripling.*

322. *Chairman.*] YOU are beadle of the parish of St. Andrew, Holborn?—Yes.

323. How long have you filled that office?—I have held the office as regards summoning juries about 14 years.

324. *Mr. Wakley.*] As a beadle or constable?—As a beadle.

325. Were you paid any thing for your services for summoning juries?—Yes, I was.

326. How much?—Three shillings and sixpence for summoning the jury, 1s. 6d. for the witnesses, and 1s. for giving information to the coroner.

327. Making how much each inquest?—Six shillings each inquest.

328. Was there any allowance to the juries?—Yes.

329. How much?—Fourpence each, as many as were sworn.

330. How long did that state of things continue?—It continued until the early part of 1837.

331. What occasioned the change then?—It was in consequence of the new Poor Law Amendment Bill; it was taken out of the hands of the overseers; they had no further funds to make the payment.

332. Those

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332. Those payments had previously been made by the overseers?—Yes, the governors and directors of the board; it was a general scale.

333. Had you from March to September, when the coroner began to pay you, any payment?—Nothing whatever.

334. What was allowed to you under the regulation made by the magistrates?—Six shillings and sixpence for summoning the juries and witnesses, and 1 s. for giving information to the coroner.

335. Did you consider that those sums were sufficient for the services performed?—Yes.

336. Were they perfectly satisfactory?—Yes; because, when I am occupied in making inquiries and getting the best evidence I can, I am oftentimes obliged to be money out of pocket to pay a man to do the duty for me, respecting my own duty as an officer.

337. Is it a laborious duty, summoning the jury and the witnesses?—They are not all alike; I have sometimes found great difficulty in doing it.

338. Did it sometimes occupy you many hours?—Yes, sometimes five or six hours, and then there has been an adjournment sometimes, and I was allowed half the sum for the adjournment.

339. Do you now perform the duties of beadle or constable for the coroner?—No, I do not.

340. How long have you ceased to perform that duty?—I sent in my resignation the 14th of March last.

341. What did you say in that resignation?—I humbly submitted to the coroner it was necessary to resign my office as summoning officer, in consequence of the nonpayment of what I had been in the habit of receiving.

342. In other words, you directly refused to act upon the warrants of the coroner, in consequence of the payments being disallowed?—On that ground, and that ground only.

343. Colonel *T. Wood.*] The disallowance of the notice?—No, the disallowance of the 7 s. 6 d. I had been in the habit of receiving.

344. What is your salary?—Seventy pounds a year.

345. Mr. *T. Duncombe.*] What duties do you perform?—I execute warrants upon persons deserting their families, and I attend generally upon the guardians of the Holborn union, and have my church-duty to perform on the Sunday.

346. You summon people, and attend your duty at the church?—I resigned summoning.

347. You serve summonses for the guardians?—Yes, circulars for the guardians.

348. Mr. *Wakley.*] By whom are the duties performed in the parish now, of summoning the juries?—By one of the parish constables.

349. Mr. *T. Duncombe.*] How long have you received the 70 l. salary?—Since the formation of the union.

350. When was that?—At the end of 1835 or the beginning of 1836.

351. What has been the number of inquests held in your parish in the course of a year?—From 12 to 15.

352. Mr. *Wakley.*] What is the population?—I really cannot answer that.

353. Upwards of 30,000?—I dare say it is; I cannot tell; we have 3,000 inhabited houses.

354. How did you summon the juries?—From house to house, taken by rotation, where I knew it was not a female inhabitant.

355. Mr. *T. Duncombe.*] So that, after all, the money you received did not amount to more than 3 l. or 4 l. a year?—No, not much more than that, it would not exceed 6 l. in any one year.

356. Mr. *G. Knight.*] When there was an inquest to be held, you did not summon the jury from the immediate neighbourhood, but you went by rotation through the parish?—Yes, by rotation through the parish.

357. Without reference to the immediate neighbourhood?—Yes.

358. Mr. *Wakley.*] Do you believe that the constables and beadles are as vigilant in the discharge of their duties now that they are unpaid as they were when paid?—I can only speak for myself; I should not.

359. Mr. *T. Duncombe.*] Do you not think you are amply paid for your duty, and that this might be thrown in?—I am often obliged to pay a person to discharge a part of my duty; it frequently happened so; on the very last case that I sum-

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moned for, that was a Miss Horton, in Devonshire-street, I was then attending the coroner on the inquest on the body of Miss Horton, and I was then wanted to take a madman to a private madhouse, and I sent down word they must get another man, and I was obliged to pay that man for it; I was allowed the cab-hire, but I had to pay the man, and that was money out of my pocket; I did not resign it headstrongly; I had the advice of a very eminent solicitor before I sent in my tender of resignation.

360. Lord *Eliot*.] Upon what principle did you summon the juries in your parish during the time you were intrusted with that duty; did you summon every householder in rotation, or did you summon the jury from the neighbourhood where the inquest was to be held?—Not exactly so; sometimes I have thought it not prudent to summon them from the immediate neighbourhood.

361. Mr. *G. Knight*.] Generally acted according to the circumstances of the case?—I generally went from house to house, and not from the immediate neighbourhood; I thought there might be gossiping.

362. Did you not make exceptions in cases of persons who ought not to be summoned, and who might suppress the truth?—When I thought they had any evidence to give, I summoned them as witnesses.

363. Did you not make exceptions of persons who ought not to be called as jurors, who were interested in suppressing the truth?—No, I never did; excepting they were lawyers,—in the law or medical men; I never summoned them, except they were witnesses; I never summoned a lawyer; I was told I might, but I never did; but the tradesmen I always summoned.

364. Lord *Eliot*.] If a tradesman told you it was inconvenient to him to be summoned, you never showed favour?—No, I never did in my life; he must show some good cause for it to the coroner.

365. *Chairman*.] Did the coroner always take your list of jurors, or refuse some he thought ought not to serve?—I never had one refused in my life; but I have been an old practitioner; I generally visit the case, and make inquiries; and if I think there is no necessity, I do not go to the coroner.

366. You never placed an improper person upon the jury?—Never, to my knowledge.

367. It has been stated to the Committee, that constantly persons are pressing to be put upon the jury?—I never met with a case of that kind.

*Richard Thomas Tubbs*, called in; and Examined.

R. T. Tubbs.

368. *Chairman*.] YOU are beadle of the parish of Islington?—Yes, not constable of the parish; we have none since the introduction of the police, or rather since Easter; the vestry thought fit to discontinue the old system of headboroughs, and so forth, of the different manors, considering they were useless; and I was, therefore, sworn in under the commissioners of police, the local magistrates not having the power.

369. You have filled the office of beadle some years?—Three years.

370. Mr. *Wakley*.] Have you not been beadle more than three years?—No, three years last Easter.

371-2. What were you allowed for summoning coroner's juries, and giving notice to the coroner?—Twelve shillings, two-thirds of which were given to the jury, and one-third I kept myself, together with 1s. that the coroner allowed for the expeditious performance of the duty; Mr. Stirling I mean.

373. You having 4s. for your services, and the jury 8s. for their attendance?—Yes, which of course was spent in refreshment, for those who chose to stop; it very frequently occurred that very few did stop; and I have known cases where I have had the pleasure of keeping nearly the whole of it.

374. That was till the Act of Victoria passed, when the coroner made the payment himself?—Yes.

375. What did you receive then?—Seven shillings and sixpence; the magistrates very kindly raised it.

376. What are you receiving now?—Nothing.

377. For the same services?—Yes.

378. How long is it since the payments were entirely withheld from you?—Since the beginning of last December the coroner ceased to give me any thing.

379. Have

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379. Have you made any application to the parochial authorities, in consequence of the payment being withheld, to renew to you the payment of 4*s.*?—No, I have merely stated I had ceased to receive any thing; and they stated that they had no power to make any such payment; that the Poor Law Commissioners had said they had not the power to do it.

380. Do you conceive that the same vigilance will be exercised by the beadles and constables in looking out for those cases in which inquests are necessary, now they are unpaid, as when they were paid for their services?—I should say, certainly not.

381. Is there much trouble given in summoning the jury and procuring the attendance of necessary witnesses?—Yes, a very great difficulty, and I will mention one, as it is so recent; the first case I had after the payment ceased, I had to go a distance of 15 or 16 miles to summon the jury and collect the witnesses together; it took me the best part of a day to arrange it; on one occasion, I had to travel to and fro, and it cost me 3*s.* or 4*s.* out of my pocket; and I am obliged often to pay to have my parochial duty done, or pay to have this done; after I have made out the summonses and signed them, I get some person to take them round for me.

382. Colonel *T. Wood.*] What salary do you receive from the parish?—One hundred pounds a-year; the place was considered once worth 300*l.* a-year, but it has been pared down; it is now barely 100*l.*

383. What is it paid out of?—It is from the poor-rate, or rather, I should more properly say, a rate levied on purpose, generally, once a year; a penny rate, called the “churchwardens’ rate,” which makes up the deficiency of the rates.

384. Mr. *Wakley.*] Have you any payment now for the services you perform upon the coroner’s inquests?—Not a penny.

385. *Chairman.*] How many inquests are there in Islington in the course of the year?—From 30 to 35 in a year; that is the average number.

386. Have you often very great difficulty in getting persons to attend the jury?—Yes, I am obliged to run about to get the jury together when the coroner arrives, and particularly in the outskirts; they lie very much apart.

387. Are persons unwilling to serve?—Yes, they are sometimes; they consider it a great hardship to take off the 4*d.*; the better class of society consider it a benefit; under the old system there was very little difficulty in getting a jury together; there used to be 8*s.*, and that used to be spent in refreshment.

388. Had you the selection of the jurors?—Yes.

389. Has the coroner ever interfered in the rejection of any jurymen you have summoned?—No, in no instance whatever.

390. Do you not find that improper persons seek to serve as jurors?—No; it is now thought a very disagreeable office to fill, nothing being allowed.

391. Some persons might wish to prevent the truth being stated, and press themselves upon the juries?—I should always prevent it; I invariably go to the rate-book; I begin at No. 1, in the street or place where the body lies, or as near as possible, and I go on till I get the 24; I summon them without regard to who or what they are.

392. Mr. *G. Knight.*] Is it your practice to take them from the neighbourhood?—Yes, as near as I can.

393. You do not take them by rotation through the district?—No, unless I have been recently in the neighbourhood.

394. *Chairman.*] Do you ever go out of the neighbourhood?—Yes, sometimes I am obliged to go some distance.

395. Where it would be improper to get jurymen of the neighbourhood, in consequence of any exciting cause?—Yes; in the case of Gould, I brought some from Islington-green.

396. Mr. *G. Knight.*] You remember some cases where excitement has existed?—Yes, in Mr. Templeman’s case.

397. And in those cases you have gone further a-field?—Yes, or to persons disinterested in the matter, and highly respectable. In the case of Mr. Templeman, I got some from Islington-green and others from Liverpool-terrace, all very respectable men.

398. Going from house to house?—Yes, without any exception, or I should have some complaints.

399. Lord *Eliot.*] It is left to your discretion to summon the jury?—Yes.

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400. You

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400. You never excuse a juryman because he says it is inconvenient to him?—No, that would be unfair; I say, “Attend, and if there is more than enough, you can appeal to the coroner;” I think it my duty to do it as fair as I can.

401. Is there great dissatisfaction among the people, on the ground of their not receiving any payment?—Yes, there is; I, for one, took the situation with a very considerable number of fees attached to the office, and I received these among the rest; I was told that the situation was worth 300*l.* a year; that was the common report; I am sorry to say I have never yet been able to arrive at half that sum.

402. And that tends to relax their vigilance and alacrity?—It is likely to produce that state of things; very few persons like to do it for nothing.

403. *Mr. Wakley.*] How many inquests have you had in the last six weeks, out of a population of 50,000?—Only one; and three years ago it was precisely similar; last summer it was the same; from the middle of May up to the end of June I had only one inquest.

404. *Lord Eliot.*] The abolition of these fees has caused a loss to you of from 15*l.* to 20*l.* a year?—Yes.

405. *Colonel T. Wood.*] You got your 4*s.* from the parish before?—Yes.

406. *Chairman.*] You stated that the discontinuance of the fees had the effect of relaxing the vigilance of the parochial constables?—Yes, it has that tendency.

407. Do you not think the not receiving fees must necessarily have the same tendency upon the constables in the metropolitan police force?—They have nothing to do with it.

408. Do they not send the notice?—Yes, as a part of their duty they send the notice to the coroner, but they have nothing further to do with it; the commissioners, I believe, have refused to let them summon the juries.

409. But the question is, whether their vigilance in regard to sending notices would not be increased by their receiving extra remuneration?—They never did receive any thing.

410. *Mr. Wakley.*] If they were to be paid for the special service of sending notices, do you think that they would be more vigilant?—Yes, no doubt of it.

*Veneris, 5<sup>o</sup> die Junii, 1840.*

## MEMBERS PRESENT :

Lord Eliot.  
Mr. Williams.  
Mr. Wakley.

Mr. G. Knight.  
Colonel T. Wood.  
Mr. T. S. Duncombe.

## LORD TEIGNMOUTH IN THE CHAIR.

*Mr. Charles Wright*, called in; and Examined.

*Mr. C. Wright.*

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411. *Chairman.*] YOU are clerk to the committees of the Middlesex magistrates?—Yes.

412. *Mr. Wakley.*] How long have you held that office?—I was appointed in April, last year.

413. In what way were the coroners' accounts passed at the time of your appointment?—They were delivered on the first day of each session, and they were referred to the committee as a matter of course; and the committee examined them.

414. To a committee specially appointed for the purpose, or to the general finance committee?—To the general finance committee.

415. At that time was any difficulty experienced in passing the coroners' accounts?—Not any.

416. When did the first difficulty in passing those accounts arise?—By difficulty, I am to understand, the first objection or deduction; it was in the accounts to October the 12th.

417. From

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417. From what date?—From the 16th of September, to the 12th of October; I beg to correct my former answer; there was a deduction made in Mr. Baker's account, from the 4th of February, to the 6th of April; that was the first account that came under my notice; it was not an objection to the fees or charges, but there was no voucher, and therefore it was not paid.

418. Was it paid afterwards?—It was, upon production of the voucher.

419. But as a matter of course, being a disbursement it was not allowed at the time, because there was no voucher to support it?—Exactly.

420. When did the first objection arise as to the charge in the coroners' accounts?—In the account, from the 16th of September to the 12th of October.

421. In whose account is that?—That is in your account.

422. What was the item objected to?—The fees and expenses upon an inquest upon the body of Henry Coleman.

423. Do you recollect the verdict in that case?—No, I do not; it is stated in the account; I have the account here.

424. Has that item been the subject of dispute from that time up to any late period?—It was disallowed, and the disallowance of it has been re-considered, and yesterday the charge was allowed by the court.

425. What was the sum in that case?—Two pounds eight shillings and two-pence.

426. What were the items of the 2*l.* 8*s.* 2*d.*?—The fee to the coroner, 1*l.* 6*s.* 8*d.*; mileage, 6*s.* and expenses paid to constable; witnesses, and for use of the room, 15*s.* 6*d.*

427. The ground of objection was, I believe, that the inquest was unnecessary?—It was.

428. Was that objection raised in the finance committee?—Yes, it was.

429. Do you take minutes of your proceedings at each sitting of the committee?—I record the resolutions of the committee.

430. Do you state by whom the resolutions are moved and seconded?—No, not invariably.

431. Was it in that case stated?—No, it was not.

432. Have you the names recorded of those gentlemen who constituted the committee upon that occasion?—I have.

433. Mr. G. Knight.] How many form a quorum?—Two did form a quorum at that time; by a recent order of the session, it would require three to form a quorum.

434. How many were actually present upon that occasion?—There were three present.

435. Mr. Williams.] Does that include the chairman?—It does; it was not Mr. Hall, the usual chairman.

436. Chairman.] Did those proceedings undergo the revision of the general committee of the magistrates?—The proceedings were reported to the court, and approved.

437. Lord Eliot.] Are such proceedings usually approved as a matter of course?—No, not as a matter of course.

438. Mr. Wakley.] Are they usually approved?—Yes.

439. Mr. Williams.] Have you ever known an instance of the recommendations of the finance committee being disapproved or disallowed?—I have known instances of their recommendations not being adopted by the court.

440. Chairman.] Were those made matter of discussion in the general court?—That would take place in the court; I have not an opportunity of answering that.

441. Lord Eliot.] Have you known cases in which charges allowed by the finance committee have been disallowed by the general court, or of cases in which charges disallowed by the finance committee have been allowed by the general court?—I cannot say that I remember any charges that were disallowed by the court, after having passed the finance committee, or the reverse.

442. Chairman.] Do those accounts undergo the subsequent revision of the general court?—No.

443. Are they ever re-considered, under any circumstances?—It was in this case; it was referred back to the committee.

444. When was it referred back to the committee?—At the last session, that was in April.



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445. Mr. *Wakley*.] Did the committee again re-consider the question?—They did.

446. How many magistrates were present upon that occasion?—Fifteen.

447. Mr. *Williams*.] What was the date of the last meeting of the magistrates forming the finance committee?—The 18th of May of this year.

448. When did the committee meet which first disallowed the charge for that inquest?—The 22d of October.

449. Mr. *Wakley*.] Then the Committee are to understand that when the resolution was adopted for disallowing the charges in October, there were only three magistrates present?—When three were present the objection was taken, and at the next meeting the disallowance was made.

450. Mr. *Knight*.] How many were present at that time?—Nine.

451. *Chairman*.] The objection was originally taken in the finance committee, when three were present; that objection was considered at a subsequent meeting of the finance committee, when there were nine present; and then the objection was adopted?—Yes.

452. That objection, thus adopted by the finance committee, at its second meeting, was subsequently brought under the consideration of the general court?—It was.

453. And the objection allowed?—Yes.

454. That resolution of the general court was, at a subsequent period, re-considered by the general court?—It was brought under the notice of the court.

455. And that objection was rescinded?—It was referred back to the finance committee, who recommended its being rescinded.

456. And the report of the finance committee was then brought before the general court again?—Yes.

457. And approved?—Yes; the recommendation of the finance committee for rescinding the original resolution was approved.

458. Then this objection came in fact thrice under the revision of the finance committee, and twice under the consideration of the court?—Not three times, under the consideration of the finance committee; the objection was taken at the first meeting, when three were present; but it was not considered then.

459. It was considered twice by the finance committee, and twice by the court?—Yes.

460. Mr. *Williams*.] Is it the custom of the finance committee to make objections to certain items in the accounts, and not to determine then upon the rejection of those items, but refer them to the consideration of a second meeting of the committee?—It is not very frequently the case.

461. What was the reason of that course being adopted in this instance?—I cannot answer that.

462. Mr. *Wakley*.] What is the minute made of the proceedings of the committee when the objection was first taken?—"The committee having entered upon the examination of the coroners' accounts, wish for explanation as to the necessity of holding inquests in the under-mentioned cases." Then there is a list of those cases.

463. How many are there?—Forty-eight.

464. Mr. *Williams*.] Were all those in Mr. *Wakley*'s district?—Thirty in Mr. *Wakley*'s district, and 18 in Mr. *Baker*'s.

465. *Chairman*.] Do you infer that the magistrates supposed there were special circumstances attending that objection, made at the finance committee, that required reference to a subsequent finance committee?—Yes, considered it necessary that the two coroners should attend to give explanations.

466. Mr. *Williams*.] Has any similar occurrence taken place, either previously or subsequently, of explanation being required with regard to inquests?—No, none that I am aware of.

467. During the period you have occupied your office, how often have the coroners' accounts been sent in?—Every session, with this exception, that since this occurrence Mr. *Wakley* has not sent them in every session; but the court require that they should be sent in every session.

468. How many sessions have there been?—Ten.

469. During those 10 sessions was there any other instance of inquests being objected to by the finance committee?—There was no other instance similar to this.

470. Was

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470. Was the number of inquests upon that occasion greater than it had been upon other occasions?—I can refer to an account of the inquests; but I do not happen to remember the period that that account embraces.

471. Who were the magistrates present at the first audit of the accounts when the objection was taken?—Mr. M<sup>c</sup>William, in the chair, Mr. Arthur Smith, and the Reverend Mr. Williams.

472. Who were present at the second meeting?—Mr. Tulk, in the chair, Mr. Arthur Smith, the Reverend Mr. Williams, Mr. Orme, Mr. Laurie, Mr. Carpenter, Mr. M<sup>c</sup>William, Mr. Russell, Mr. Wigg.

473. Who were present on the occasion when the bill was referred back by the court to the finance committee?—Mr. Hall, in the chair, Sir James Williams, Major Anderson, Mr. Tulk, Mr. M<sup>c</sup>William, Mr. Russell, Mr. Laurie, the Reverend Mr. Williams, Mr. Wilks, Sir John Hansler, Mr. Pownall, Mr. Gibson, Mr. Serjeant Adams, Mr. Carpenter, Mr. Thistleton Dyer.

474. Mr. *Wakley*.] What was the resolution adopted by that committee?—That the sum of 2*l.* 8*s.* 2*d.* should be paid for the inquest held on the body of the boy called Henry Coleman; “It was moved by Mr. Tulk and seconded by Mr. Pownall, that this committee having again examined the circumstances of the inquest taken on the body of Henry Coleman, and it appearing that the lad died in consequence of an accidental wound, it is not desirable to refuse payment of the sum of 2*l.* 8*s.* 2*d.*, charges made by the coroner for holding the inquest;” to which an amendment was moved by Mr. Laurie, seconded by the Reverend Mr. Williams, “That at a committee held on the 7th of January, when the charge for the inquest held on the body of Henry Coleman was taken into consideration, and the committee, after having heard Mr. Wakley by himself and counsel thereon, decided that such charge should be disallowed; and the court, having twice confirmed the report of the committee, and no fresh evidence having been tendered to this committee, to show that such decision should be reversed, this committee see no reason for altering the decision formerly agreed to;” and the said amendment being put to the vote was, on a division, lost; whereupon said original motion was put to the vote, and on a division carried. “Resolved, that this committee will recommend the court to order payment of the said sum of 2*l.* 8*s.* 2*d.* to Mr. Wakley.”

475. Mr. *Williams*.] Was there any resolution proposed at the second meeting? No; I will read the minute I have: “The committee having discussed the case of Henry Coleman—tetanus—disallow the charge for the inquest, mileage, and the expenses paid to the witnesses.”

476. Does it appear from the minutes that the three magistrates who were present on the first occasion, and who took the objection to those numerous inquests, were in the habit of attending the examination of the coroners’ bills previously to that instance?—I have examined the minutes, and I find that two of the gentlemen were in the habit of attending; one had not been in the habit of attending.

477. Will you name the two?—It will appear by the minutes that Mr. M<sup>c</sup>William and Mr. Arthur Smith had been in the habit of attending.

478. Mr. *Wakley*.] Do you find that the name of the Rev. Theodore Williams appears on the minutes of any finance committee previously?—Not during the time I have acted as clerk.

479. Do you find that he has attended any finance committee during the two years previously?—I do not find that he has.

480. Mr. *Williams*.] At the second meeting of the finance committee, which considered the objections taken by the previous meeting to the 48 inquests; were any of the 48 finally disallowed?—Coleman’s case was the only case that was disallowed.

481. Mr. *Wakley*.] So that now, not one has been disallowed?—No.

482. The payment of the whole 48 has been ordered?—Yes.

483. Mr. *Williams*.] Does it appear upon the minutes of the first meeting, at which three magistrates were present, who moved the objection to those inquests?—It is not altogether an objection at the first meeting; there is a list of which the committee consider that explanation is necessary, but there is no name given.

484. Does it appear upon the minutes of the second meeting who moved the disallowance of the charges for the inquest in the case of Coleman?—No, it does not appear.

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485. Mr.

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485. Mr. *Wakley*.] Is that account which you hold in your hand the one which was delivered in October last, and which contains the charges for the inquest held on Henry Coleman?—Yes, it is.

486. Do the signatures on the back of that account exhibit the names of those magistrates who disallowed the charges in the case of Henry Coleman?—Not exactly; the disallowance of this part of the account was determined upon at a second meeting; the account was not finally audited, in other respects, till the 7th of January; on the 7th of January those signatures were attached to it.

487. Will you read the names?—Mr. M<sup>r</sup>. William, the Rev. Mr. Williams and Mr. Laurie.

488. Who was the magistrate who first moved in the general court for a committee to inquire into the circumstances which had led to an increase in the number of inquests?—Of that I have no official knowledge at all.

489. *Chairman*.] You are not clerk of the court?—I am not.

490. Mr. *Wakley*.] You have no minutes of the proceedings of the general court?—Not any.

491. Have you examined the coroners' accounts since the year 1824, for the purpose of ascertaining what deductions have been made from them from that time up to December 1829?—No, I have not.

492. Have you had time to do so?—They are not in my possession; they are in the possession of the clerk of the peace.

493. Have you examined the minutes of the finance committee for the purpose of ascertaining whether any deductions have been made in the years I have named?—No, I have not; since the period of my appointment as clerk of the committees, I have examined the books, and no deduction has been made, except in the case of Coleman, and the one in Mr. Baker's account that I mentioned before for want of a voucher, that was a payment made by him.

494. How long are the accounts in your possession after they are presented to the court?—I have all the coroners' accounts in my possession.

495. For how long a period?—From April last year; since my appointment.

496. But not the accounts which were presented before you were in the office?—No.

497. Do you know whether the accounts which have been sent in by the coroners during the last year are similar to the accounts which have been sent in by them for any number of preceding years?—No, I do not know it.

498. Have any proceedings been adopted by the magistrates with reference to the charges for mileage?—There has been a recommendation to the court, that for intermediate mileage the coroners should not be allowed to charge, as they had been in the habit of charging, from the place of their residence to the place of holding inquests, in case they held two inquests on the same day and at the same place; they had been in the habit of charging mileage from their place of residence in each case.

499. Is the mode of auditing the accounts in that respect entirely changed?—There will be a change consequent upon that resolution which was adopted but yesterday by the court; it was the recommendation of the committee, and they confirmed it yesterday.

500. Were the mileage charges formerly allowed, when you first entered the office, from the residence of the coroner to the place of holding the inquest?—The charges were allowed in every case.

501. Are there any minutes with reference to mileage before that of yesterday?—There have been sometimes deductions made from the number of miles that have been charged.

502. Since what period?—Since October.

503. Have any deductions been made from the accounts which have been sent in from April up to October, before the case of Coleman occurred?—None.

504. *Chairman*.] Does the alteration with regard to mileage make a material reduction in the receipts of the coroner?—I should think not; I should think it would not decrease the receipts of the coroner.

505. Mr. *Williams*.] Is there any difference in the amount of disbursements made by Mr. Baker and Mr. Wakley on the aggregate?—The amount of disbursements in Mr. Baker's cases are greater on the average than Mr. Wakley's, to some extent.

506. In what proportion?—I think the last account of Mr. Wakley's averages 15*s*. in each case, and Mr. Baker's 25*s*.

507. What

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507. What produces that great difference?—That I have not gone into.

508. Could you furnish the Committee with the items which form the difference?—Yes, I think I could.

509. Mr. *Wakley*.] Until the case of Coleman occurred, was there any difficulty whatever in passing the coroners' accounts?—None.

510. Lord *Eliot*.] Have you referred to any of Mr. Stirling's accounts?—I have.

511. Do you know whether the charges made by Mr. Stirling for inquests held by deputy were ever disallowed?—Not having acted as clerk to the committees at that time, I do not know it officially; I have seen some of Mr. Stirling's accounts, having been connected with the sessions 20 years.

512. Have the charges made by Mr. Wakley for inquests held by deputy been disallowed?—Some have.

513. Were not they all disallowed?—No, I believe not all.

514. Do you know any ground for the distinction that appears to have been made?—There were two taken by deputy of which the committee were not informed that the payments had been made; the committee were not aware that those cases had been taken by deputy.

515. Then the intention of the committee was to disallow the charges for all inquests that were taken by deputy?—Yes.

516. Mr. *Wakley*.] Was there any difference in the mode of framing the accounts of Mr. Stirling and Mr. Wakley?—No, I believe none.

517. Were they sent in in the same handwriting?—Yes.

518. Lord *Eliot*.] Do you know that Mr. Baker is in the habit of making payments to parochial officers for summoning the juries?—Yes, he is.

519. Are such charges allowed by the finance committee?—Yes.

520. Do you know that Mr. Wakley is not in the habit of making allowances to parochial officers for discharging such duties?—I think, in some cases, the parochial officers are paid in Mr. Wakley's inquests.

521. Mr. *Wakley*.] Can you state in what parishes?—No, I cannot.

522. Is it in the country parishes where there are no paid officers?—I presume it is.

523. Lord *Eliot*.] Are any payments of that nature made by Mr. Wakley in the metropolitan parishes?—No, I think not.

524. Are any such payments made by Mr. Baker in the metropolitan parishes?—Yes, there are payments made by Mr. Baker; but the order of the court is, that they should not be paid to parochial officers, being paid constables; where the committee have an opportunity of ascertaining that they are constables, and receive salaries, no payment would be allowed.

525. Is there any distinction made between the office of constable and that of beadle?—If the beadle was a constable, and he was to receive a salary as a constable, the payment would not be allowed.

526. Having a salary as beadle, is the payment to him allowed by the magistrates?—It does not appear by the vouchers whether he receives a salary or not.

527. Is that question not asked of Mr. Baker when his accounts are produced?—It may have been asked by some of the committee; that would be a matter of recollection on my part.

528. Mr. *Williams*.] In Mr. Baker's accounts, has the charge of payments to beadles disappeared?—I think such a charge has appeared.

529. Does he make a distinction between the beadles and constables in his account of disbursements?—I think there is a distinction in some of the vouchers.

530. Have the magistrates lately issued a new schedule of fees and allowances?—Yes.

531. Does the schedule recently issued differ from the one which was in existence previously?—Yes, it does.

532. What does the difference consist in?—I have not one of the old schedules with me; it was settled some years before I was clerk, and I cannot state the exact difference.

533. Has the revision of the schedule made any alteration in the amount of disbursements?—The schedule was settled by the sessions in January last, and I have not observed any difference; it is but recent; there has been but one account of Mr. Wakley since, or two accounts.

534. In the accounts sent in by Mr. Baker and Mr. Wakley, since the new schedule has come into operation, have they observed strictly in their charges the conditions of the schedule?—As far as we have been able to get at the fact, but

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now they are sworn to the fact of their having complied with the terms of the schedule.

535. In point of fact, the Committee would reject any charge contrary to that which is warranted by the schedule?—Certainly.

536. *Chairman.*] This question was asked Mr. Baker, “Has not this inhibition of the Middlesex magistrates as to the constables or officers receiving regular salaries or wages become a dead letter?” and his answer was, “Yes, I think it has;” does that statement of Mr. Baker agree with your experience?—No, it does not; if we had an opportunity of discovering by his account and by his vouchers that he had not complied with the schedule, those charges would be disallowed as a matter of course.

537. Mr. *Wakley.*] Do you go through the accounts by direction of the magistrates?—I do; I compare the vouchers with the accounts and the castings.

538. You audit the accounts before they are seen by the magistrates?—No, mine is not the audit; they are audited by the magistrates themselves; I go through them to see that every voucher is there, that the inquisitions are returned, and that the castings are correct.

539. Lord *Eliot.*] Do you consider that it would be your duty to call the attention of the magistrates to any item that did not seem to be correct?—Yes.

540. Have you drawn the attention of the magistrates to the fact of any difference existing between the two accounts?—No.

541. Mr. *Williams.*] The former schedule allowed payments to constables and beadles who received salaries from the parishes?—Yes.

542. But the last schedule disallowed any payments to paid constables or beadles?—Yes, to paid officers, being constables.

543. Did I understand you correctly in giving your answer to the former question, that Mr. Baker has, subsequently to the issue of the schedule, paid constables or beadles?—He has paid constables.

544. Lord *Eliot.*] Your understanding of the schedule is, that there is a distinction between constables and beadles?—Yes.

545. Mr. *Wakley.*] If I were to pay the salaried beadles in the parish of St. Pancras, they receiving no salary as constables, and some of them not being constables, would you consider that it would furnish an inaccuracy in my account, and would you call the attention of the magistrates, under their direction, to that circumstance?—Beadles being constables.

546. But receiving no salaries as constables?—Yes; I should call the attention of the finance committee to it, if it appeared upon the vouchers that they were constables, and I had any means of ascertaining that they were paid.

547. *Chairman.*] Do you not feel it to be your duty to adhere, in the inspection of the accounts, to the rules laid down by the magistrates in their report of the 31st of October 1839, and confirmed by the schedule?—Yes.

548. One of those rules states that those allowances are no longer to be paid “to parochial constables or officers receiving fixed salaries or wages;” would you not consider a beadle a parochial officer receiving a fixed salary?—Yes.

549. Would you not, therefore, consider yourself bound to recommend to the magistrates the disallowance of such payments to such officers?—I should, if I were aware of the fact.

550. But you are aware that Mr. Baker is in the habit of paying such officers?—I am not aware of it.

551. But supposing Mr. Baker had made such payments, would it or would it not come necessarily under your cognizance?—No, it would not appear that he had paid a salaried officer.

552. Then you do not in fact make inquiries as to the individual officers to whom the payment is made?—I have no means of making the inquiries; the court have got rid of that difficulty now; an oath is tendered to the coroner. Mr. Baker, for instance, was asked upon his oath, whether he had conformed to the schedule; that recent regulation of the session is the guarantee.

553. Then the amount of your statement made to the Committee is this: that supposing such payments as I have alluded to should come under your cognizance, you would feel yourself bound to recommend to the magistrates the disallowance of them, but that inasmuch as you have no means of taking cognizance of them, you are not called upon to make any recommendation of the kind?—That is the case.

554. Then, practically, the matter does not come under your knowledge officially?—No, it does not.

555. Then

555. Then what is the reason for your having stated that you would disallow such payments?—I mean that I should disallow them if they came under my notice.

556. But as they are not under your cognizance, you have nothing to do with the matter?—I have not observed it; if I had I should have mentioned it to the magistrates.

557. Colonel *T. Wood*.] Have either of the coroners applied to the magistrates for an explanation of the schedule?—No, there has been no official application.

*George Deverell*, called in; and Examined.

558. *Chairman*.] YOU are beadle of the parish of Shadwell?—Yes.

559. How long have you filled that situation?—Upwards of 14 years.

560. Do you receive a regular salary?—Yes.

561. From the parish?—Yes.

562. What does it amount to?—Seventy-six pounds per year.

563. Does it consist in part of fees?—That part of the amount of my salary does not; there are certain fees besides that, which the parish recognize, and which on my taking office were a consideration, otherwise my salary would have been more, such as on occasion of fires, the militia, and the inquest fees; the inquests, properly speaking, were done by the constable; my appointment was as his representative, as constable's beadle, doing that work that a tradesman could not devote his time to, his time being of more value.

564. Is it a fact that the duty of sending notice to the coroner is transferred from the parochial constables to the metropolitan police?—No, the warrants have always been directed to me till such times as the alterations in the fees took place, and the magistrates demurred about their being paid to paid officers, since which the warrants to secure the payment of the expenses are directed to the constable, and I perform the duties; I am sworn in as constable's beadle as well as beadle.

565. Are you sworn in as constable?—I am sworn in as beadle, not as constable.

566. But you state that the metropolitan police constables do not send the notices?—They do not, so far as I am aware, in our district; they have never done it in the parish where I live; whether it is done in other parishes, I cannot speak.

567. There is a letter from the commissioners of police to the Middlesex magistrates distinctly authorizing the employment of police constables in giving notices, but not in summoning the jury?—Yes, any person can give notice to the coroner, but the coroner immediately communicates it to the summoning officer.

568. Then do you mean to say that in no instance has it occurred in your parish that the metropolitan police constables have sent notice to the coroner?—I should think it their duty to do so.

569. That is at variance with the statement you made in one of your former answers?—I did not understand it; but to correct myself, if you please, I will state that the coroner will receive information from any one. The police might be tenacious of sending to the coroner; or mostly they send to me.

570. You stated that you, as beadle, considered yourself the representative of the constable?—Yes.

571. What constable?—The constable that is sworn in once a year.

572. How many parish constables are there?—There are six headboroughs, and one constable, a person whom they are in authority under.

573. Then any fees which you received as deputy must have been considered as fees to the principal whom you represented?—Yes; the parish allowed the constable a sum for the militia, which was attended with a very great trouble to him; I had a great deal of time on my hands; I did it for him, and the parish paid me; and in the same way as regarded inquests.

574. Mr. *Wakley*.] When the new schedule was first issued, was payment withheld from you?—Yes.

575. At what time was that?—I do not recollect the month.

576. Was it last winter?—I cannot recollect.

577. What payment do you now receive?—I receive none, except what the coroner pays to the constable; the warrant is sent for the summoning of the inquest to the constable, and the constable gives a receipt for the money, which he hands over to me as his deputy; I make out the summonses for him to sign.

578. Lord *Eliot*.] Then, in point of fact, you get the fees as heretofore?—I do.

549.

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579. Mr.

Mr. *C. Wright*.

5 June 1840.

*George Deverell*.

*George Deverell.*

5 June 1840.

579. *Mr. Williams.*] Do you summon the jury or the constable?—I go round with the summonses, but I take them, prepared, to the constable for signing, and he signs them.

580. And you deliver them?—Yes, and I open the court.

581. *Mr. G. Knight.*] Do you select the people who are to be on the jury?—Yes.

582. You fix who they are to be?—Yes.

583. *Lord Eliot.*] Do I understand you to say that you receive the fees as heretofore?—Yes.

584. *Mr. Wakley.*] Did you receive any thing before?—I did the duty, and received the fees before.

585. The constable having nothing to do with it before?—Yes.

586. *Mr. Williams.*] Were the warrants sent to you as beadle previously to the issuing of the last schedule?—Yes.

587. Who attends the inquests?—I do.

588. Do you summon the witnesses?—Yes.

589. And you are the person who looks out for evidence to be produced before the coroner?—Yes, the constable would be totally unfit for such a duty; it would require a lapse of time to qualify him to get witnesses together; I have had inquests of that nature that have taken up so much time, and required so much discrimination, that a person, without he had been properly bred to the office, and properly acquainted with it, would not have been able to follow it up; I had the inquest upon the Victoria steam-boat, which lasted nine days; I do not wish to introduce myself as being superior, except by experience; the experience I have had for the last 13 years, I consider, qualifies me.

590. Then, in fact, you perform all the duties relative to the inquest, such as summoning the jury, procuring the witnesses, and all other matters, in the name of the constable?—Yes, and I do it with the approbation of the parish; the parish are aware of it, knowing the difficulties and the unpleasantness of the inquests: that if I were to detail to you some of their offensiveness, you would hardly credit it.

591. *Mr. Wakley.*] What were you paid for performing the duties of the inquests before the Poor Law Amendment Act was passed?—There was a distinction made; it will be necessary to explain that part: when it fell upon the parish, the parish allowed but 11s.; if the expenses fell upon the friends of the deceased, then they were charged 16s.; and the way that it was ascertained was, that the parish would not pay the expenses of the inquest without they had buried the party; as persons do not like to bury their friends as paupers, they mostly paid the fee; the proof that the parish required of the payment of those fees was the certificate of interment from the coroner, which was endorsed at the back at the time they were paid.

592. Had the jury any allowance?—Yes, the jury had 6s. of it.

593. *Chairman.*] Have the juries expressed any dissatisfaction at being no longer paid?—Very much so; the parties were well satisfied, and complaints were made at the unequal distribution of the inquests, for they were desirable among publicans, and they oftentimes attended them; but the jurymen are very much dissatisfied at not receiving any allowance.

594. You were asked just now whether you had not the selection of the jurors; do not you find, in frequent cases, individuals pressing forward to become jurors who are interested in preventing the truth from being discovered, and whom you feel it your duty to reject?—I have never found that the case; I have found an evil connected with it on one or two occasions, where, from strong prejudice, I have been solicited to get on the jury persons that have been hostile.

595. And you have invariably taken pains in investigating such cases?—Yes.

596. Your lists come, as a matter of course, invariably under the supervision of the coroner?—Certainly.

597. Has the coroner ever made inquiries of the individuals upon the list?—No, never.

598. Has he ever struck out any individual as objectionable whom you had recommended as a juror?—I think there has been an objection to one on one occasion; but it has been a solitary instance, if it has.

599. *Mr. Williams.*] Since the allowance to jurors has been discontinued, have you found any difficulty in getting juries?—Yes, a very great deal of difficulty; and there is another thing too that makes it more difficult; most of the inquests during Mr. Unwin's time were taken of an evening, which, in a neighbourhood like



*George Deverell.*

5 June 1840.

like ours, is less attended with inconvenience; but now that they are held mostly in the day, with the tradesmen it is attended with great inconvenience, and therefore they complain.

600. *Chairman.*] Did the juries, when they assembled in the evening, after the inquest was held, indulge themselves a little more freely than might be desirable in a matter of such solemnity?—Yes; inquests occurred so often in our parish.

601. *Mr. Wakley.*] What is the population of your parish?—I cannot tell.

602. *Mr. Williams.*] Are the same persons frequently summoned on juries?—Yes.

603. How often do you suppose that the same person serves on a jury in the course of 12 months?—If it is a common drowning case, there are persons that I know that I can get when the subject does not demand any particular inquiry; if it is a case that does demand inquiry, the selection is made of parish officers, and other persons whom it will be necessary to summon.

604. *Mr. Wakley.*] When you say cases that demand no particular inquiry, you mean cases where the circumstances attending the inquiry are well known?—Yes.

605. *Chairman.*] Do you ever go out of your neighbourhood for jurymen when you think there is any objection, from local prejudices or excitement, to persons residing in the immediate neighbourhood?—Yes.

606. *Mr. Wakley.*] You said that Mr. Unwin took the inquests of an evening?—Yes.

607. Did any body act as deputy for him?—He seldom acted for himself; I do not suppose there was half-a-score cases in the year which his son did not take for him.

608. Did any body take inquests for Mr. Unwin besides his son?—I do not think there was any person.

609. Did Mr. Burford take any for him?—I do not recollect that he did; if he had, I think I should have remembered it.

610. Was Mr. Unwin's son a solicitor?—I can hardly answer that question.

611. Was it the practice during the whole period of his acting in your district, that inquests were taken by the son for the father?—Yes; and another practice, which does not exist at the present time, was, that the jury were not subject to so much detention as they are at present, because while I was taking the jury to see the body, Mr. Unwin was taking the evidence; the coroner never went to see the body; young Mr. Unwin did not.

612. Did the father go?—He went with me if he attended, but I do not think there were four or five times that he attended; and then the evidence was being gone through, which shortened the time considerably.

613. *Mr. Williams.*] Did the coroner take down evidence when the jury were absent?—Yes, and when they came back it was read to them.

614. *Mr. Wakley.*] If all payment were to be withheld from you, would you continue to perform the duties of summoning the juries?—The parish would certainly compel me to do it if the constable were to complain of the duty being put upon him; the parish have the beadle in that respect, that they would compel me to do it, and it would be a great hardship, I assure you.

615. Is your salary paid out of the poor-rate?—Half out of the poor-rate and half out of what we call the conjoint-rate, which is the lighting and cleansing rate.

*Martis, 16<sup>o</sup> die Junii, 1840.*

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## MEMBERS PRESENT :

Sir George Strickland.  
Mr. Wakley.  
Colonel T. Wood.  
Mr. Aglionby.

Lord Eliot.  
Mr. Gally Knight.  
Mr. W. Williams.

## LORD TEIGNMOUTH IN THE CHAIR.

Mr. *Henry Edmondson*, called in; and Examined.

Mr. *H. Edmondson*.  
16 June 1840.

616. *Chairman.*] YOU are the deputy-clerk of the peace to the Middlesex magistrates?—I am.

617. How long have you held that situation?—A year and about eight months; rather more than eight months.

618. Mr. *Wakley.*] What connexion have you with the accounts of the coroners for the county?—It has been the custom for the accounts to be sent in to the clerk of the peace, they are then handed over to the clerk of the committees, by whom they are submitted to the committee of accounts. In point of practice, latterly, the accounts of the coroners have gone to the committee clerk in the first instance.

619. How long since has that been the case?—I think during the time that Mr. Wright has been clerk of the committee, but I am not perfectly certain of that.

620. The accounts having gone before the committee of accounts, what is done with them afterwards?—I cannot tell what passes in the committee, but the committee of the accounts of the county may bring up a report, in which they report upon the accounts they have audited; and generally there is a recommendation that the accounts be paid, or any other recommendation they may think fit to make to the justices.

621. Have you ever known the accounts of the coroners returned back to the finance committee, or to the committee of accounts, from want of vouchers?—No, I think not until latterly.

622. When you say latterly, to what period do you refer?—I think it must have been at the latter end of last year, at the September or October sessions; I can tell by reference to the documents I have with me.

623. Do you state that you do not recollect that any coroner's accounts have been returned from the general court to the committee of accounts, in consequence of the absence of sufficient vouchers?—I do not remember any case of the kind till the case I have just alluded to.

624. When was that case?—I think it was in either the September or the October sessions of 1839.

625. Can you ascertain when it was, by reference to your minute-book?—I can.

626. Have the goodness to do so?—[*The Witness referred to the book.*]—It was on the 10th of October 1839, the committee of accounts presented their report; the report was received, and there was a motion made; the words are, "Resolved, that the said report be received;" then Robert M<sup>c</sup>William, Esq., moved, 'That the recommendation in the said report, as to the accounts of the coroner, be adopted by this court;' and the same having been seconded, Peter Laurie, Esq., moved by way of amendment, 'That so much of the said report as relates to the payment of the accounts of the coroners, be referred back to the committee for accounts and general purposes for re-consideration, for want of sufficient vouchers;' and the same having been seconded, it was resolved, and ordered accordingly."

627. Was

627. Was there any division on that amendment?—I cannot recollect.

Mr. H. Edmondson.

628. What is the next minute you have in the book, in relation to the coroner?  
—“ Peter Laurie, Esq. then moved that it be referred to a special committee to inquire into the causes of the increase of inquests, since the passing of the statute of the 1st and 2d Victoria, c. 68, and to re-consider the schedule of fees now paid under that statute, and to report generally; and Benjamin Rotch, Esq. having seconded the same, it was resolved and ordered accordingly.” Then there is another resolution, “ That such committee do consist of the following: the chairman of the court, the chairman of the committee of accounts, Sir James Williams, Peter Laurie, Esq., Charles Augustus Tulk, Esq., Robert M<sup>c</sup>William, Esq., Thomas Gibson, Esq., Henry Pownall, Esq., Benjamin John Armstrong, Esq., and that three do form a quorum.”

16 June 1840.

629. What is the next minute you have in relation to the coroners?—The next date is the 31st of October 1839, that was the county day; the October quarter sessions. There is a report of the committee for accounts, in which the committee state, “ That having, pursuant to the order of the court, re-considered the accounts of the coroners for the county presented at the last session, they again beg leave to recommend the court to order payment of the said accounts; namely, to Thomas Wakley, Esq., 123*l.* 1*s.* 10*d.*, and to William Baker, Esq., 116*l.* 2*s.* 9*d.*

630. Was that order made with reference to the previous resolution, that is, to the account which had been referred from the want of vouchers?—Exactly so.

631. Was there any deduction made from that account?—I have the account here, I can tell by looking at it; it will appear upon the roll.—[*The Witness referred to the same.*]—No deduction appears upon this roll, on Mr. Wakley's account, and no deduction from Mr. Baker's account presented at the September sessions, and which former account was returned back for re-consideration for want of vouchers.

632. Up to what date were those accounts delivered?—Mr. Wakley's account was from the 14th of August to the 14th of September 1839, inclusive; Mr. Baker's from the 16th of August to the 13th of September, also inclusive.

633. Lord *Eliot*.] Does there appear to be any difference in the charges made for the inquests held by the two coroners?—The sums paid by the coroner on each inquest appear upon the account.

634. What was the whole number of inquests held by each coroner, and the amount of expenses included in the accounts?—By Mr. Wakley there were 47 inquests held, and the expenses paid out of pocket on them by the coroner amounted to 49*l.* 9*s.* 6*d.*; in Mr. Baker's account there appear to be 39 inquests, the expenses on which, paid by the coroner, were 60*l.* 1*s.*

635. Mr. Wakley's account appears to have been in two instances referred back by the court to the finance committee; did that take place in the case of Mr. Baker's account?—The accounts of the coroners were both referred back; the notice I received from the Committee of the House of Commons required me to bring here a statement of any deductions I found to have been made in the accounts of the coroners since the year 1820; I have examined the whole of the books from that period, and I find there were one or two deductions made in the previous years.

636. Will you refer to the next proceeding which took place in the court on this subject?—I have stated that the committee recommended the payment of the accounts of the coroners; that was on the 31st of October. The committee further report, that they have postponed, until the next quarter sessions, their report on the accounts presented at the present sessions by the coroners, namely, that of Thomas Wakley, Esq., for 141*l.* 10*s.* 6*d.*, and that of William Baker, Esq., for 174*l.* 16*s.* 6*d.*, until after the special committee, appointed on the 10th instant to consider and report generally on the subject of coroners' duties and fees, present their report; and the committee recommended that, in the meantime, the sum of 120*l.* be paid to Thomas Wakley, Esq., and the sum of 150*l.* to William Baker, Esq., on account and in part payment of the said last-mentioned claims.

637. Was that recommendation acted upon?—I believe it was; there was a resolution “ that the clerk of the peace be and he is hereby authorized and directed to issue orders on the county treasurer for payment of the accounts of the coroners, referred to the said committee on the 10th day of October instant for re-consideration, namely, to Thomas Wakley, 123*l.* 1*s.* 10*d.*, and to William Baker, 116*l.* 2*s.* 9*d.* Resolved also, that the clerk of the peace be and he is hereby authorized and directed to issue orders on the county treasurer for payment of

Mr. H. Edmondson. the sum of 120*l.* to Thomas Wakley, Esq., and the sum of 150*l.* to William Baker, Esq., on account and in part payment of their said last-mentioned claims, as recommended in the said report.”

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638. Will you proceed to state what the report of that committee was, and what took place in consequence of it?—The report was presented on the 31st of October to the court, and the resolution of the court was, “That the said report be printed, and a copy thereof sent to every acting justice of the peace for the county, and that the same be taken into consideration on the next county day.”

639. *Chairman.*] Is that the same report which is now shown to you?—This is a copy of the report which was ordered to be printed on the 31st of October 1839.

[*This Report is printed in the Minutes of Evidence, page 8.*]

640. Lord *Eliot.*] What was the next proceeding on this subject?—The next proceeding took place on the 19th of December 1839; there is a report of the committee for accounts; the account of the coroners for the county having been laid before your committee for inquisitions taken as under: Thomas Wakley, Esq., M. P., from the 14th of October to the 7th of December 1839, 107 inquisitions, 142*l.* 13*s.* 4*d.*; mileage, 13*l.* 14*s.* 6*d.*; expenses paid, 95*l.* 0*s.* 6*d.*, making 251*l.* 8*s.* 4*d.*; balance on the last account, 21*l.* 10*s.* 6*d.* William Baker, Esq., from the 14th of October to the 9th of December 1839, 117 inquisitions, 156*l.*; mileage, 10*l.* 15*s.* 3*d.*; expenses paid, 181*l.* 9*s.*, making 348*l.* 4*s.* 3*d.*; balance on the last account, 24*l.* 16*s.* 6*d.*

641. Have you that account?—Yes; this is Mr. Baker’s account from the 14th of October to the 9th of December; there are 117 inquests; the expenses paid upon those inquests, 181*l.* 9*s.*

642. Mr. *Williams.*] What was the amount paid out of pocket on the 107 inquests held by Mr. Wakley?—Ninety-five pounds and sixpence, as appears by the account.

643. Are you quite clear that you are speaking only of expenses charged out of pocket on those inquisitions?—It appears so from the accounts themselves that I hold in my hand; the words are, “117 inquests, at 1*l.* 6*s.* 8*d.* each, making 156*l.*; 287 miles, at 9*d.*, 10*l.* 15*s.* 3*d.*”

644. Those accounts are the official accounts?—Yes, they are the original accounts presented by the coroner at each session.

645. Have you looked over the items of charge made by Mr. Wakley and by Mr. Baker, so as to be able to account for the enormously greater charge in Mr. Baker’s account for his expenses than those of Mr. Wakley?—No, I have not examined into that; those accounts are considered by the committee of accounts, and that committee reports upon them to the court; I can only speak of the order of the court.

646. Mr. *Wakley.*] Does that account of Mr. Baker show by whom it was audited and passed?—I have these words by the committee: “Account examined, and allowed after making the above deduction, which is for mileage overcharged, 1*l.* 1*s.*” It is signed “Robert Mac William, Theodore Williams, P. Laurie.”

647. Mr. *Williams.*] Will you proceed with the minute?—“And in consequence of the further consideration of the coroners’ last accounts having been adjourned to the next quarter sessions, and also the accounts to the present session having been only delivered on the previous evening and on the morning of the committee meeting, they recommend the court to order that Mr. Wakley be paid for the present 150*l.*, and Mr. Baker 250*l.*, so that the consideration of the last and the present accounts may be determined upon at the same time.” There is a resolution of the court respecting the coroners’ accounts—“Resolved, that the clerk of the peace be and he is hereby authorized and directed to issue orders on the county treasurer for the payment of the sum of 150*l.* to Thomas Wakley, Esq., and the sum of 250*l.* to William Baker, Esq., on account.” On the day subsequent, or on the same day, the report of the special committee on the increase of inquests was considered by the court. The entry is, “The court having considered the report of the special committee to whom it was referred on the 10th day of October last, to inquire into the causes of the increase of inquests since the passing of the statute of the 1st of Victoria, and to re-consider the schedule of fees under that statute. Resolved, that the said report be and the same is hereby approved and adopted. Resolved, also, that the proposed schedule of fees, allowances and disbursements to be paid by the coroners, pursuant to the Act of

1 Vict.

1 Vict. c. 68, intituled, 'An Act to provide for the Payment of Expenses in holding Coroners' Inquests, annexed to the said report, be and the same is hereby approved and adopted."

648. *Sir George Strickland.*] Up to what period does that come?—The 19th of December 1839.

649. What was the next proceeding on this subject?—On the 16th of January 1840, there was a report of the committee of accounts and general purposes to the magistrates in quarter sessions; it is headed, "Coroner, T. Wakley, Esq.: fees and mileage, on taking 57 inquisitions on view of dead bodies, from the 16th of September to the 12th of October 1839: fees, 76*l.*; mileage, 9*l.* 11*s.* 6*d.*; expenses, 56*l.*; total, 141*l.* 10*s.* 6*d.*; paid on account, 120*l.*; remaining due, 21*l.* 10*s.* 6*d.*; deduct fees, mileage and expenses paid to witnesses upon taking an inquisition on the body of Henry Coleman, 2*l.* 8*s.* 2*d.*; deduct mileage overcharged, 10*s.* 6*d.*; total deduction, 2*l.* 18*s.* 6*d.*, leaving 18*l.* 11*s.* 10*d.* Thomas Wakley, Esq., fees and mileage, on taking 107 inquisitions, from the 14th of October to the 7th of December 1839: fees, 142*l.* 13*s.* 4*d.*; mileage, 13*l.* 14*s.* 6*d.*; expenses, 95*l.* 0*s.* 6*d.*, making 251*l.* 8*s.* 4*d.*; paid on account, 150*l.*, leaving 101*l.* 8*s.* 4*d.*; deduct mileage overcharged, 16*s.* 6*d.*; remaining to be paid, 100*l.* 11*s.* 10*d.* William Baker, Esq., fees and mileage, on taking 54 inquisitions, from the 17th of September to the 12th of October 1839: fees, 72*l.*; mileage, 5*l.* 18*s.* 6*d.*; expenses paid, 96*l.* 18*s.* 8*d.*; making 174*l.* 17*s.* 2*d.*; paid on account, 150*l.*, leaving 24*l.* 17*s.* 6*d.*; deduct mileage overcharged, 1*l.* 2*s.* 6*d.*; remaining to be paid, 23*l.* 15*s.* William Baker, Esq., fees and mileage, on taking 117 inquisitions, from the 14th of October to the 9th of December 1839: fees, 156*l.*; mileage, 10*l.* 15*s.* 3*d.*; expenses, 181*l.* 9*s.*, making 348*l.* 4*s.* 3*d.*; paid on account, 250*l.*, leaving 98*l.* 4*s.* 3*d.*; deduct mileage overcharged, 1*l.* 1*s.*, leaving 97*l.* 3*s.* 3*d.* Your committee having maturely considered the coroners' accounts before mentioned, recommend the court to disallow the charges made by Mr. Wakley, upon taking the inquisition upon the body of Henry Coleman, at the parish of Hendon, on the 2d of October last; such inquisition being in the opinion of your committee unnecessary; and they also recommend that 1*l.* 7*s.* should be deducted from Mr. Wakley's said account; and from Mr. Baker's, 2*l.* 3*s.* 6*d.* for mileage overcharged. Resolved, that the charges made by Mr. Wakley upon taking the inquisition upon the body of Henry Coleman, at the parish of Hendon, on the 2d of October last, be disallowed, as recommended in the said report."

650. *Chairman.*] How many magistrates were present on that occasion?—I am not able to tell without referring to the minute-book, which I have not here; I have the names of 30 entered; there were certainly more.

651. *Mr. Wakley.*] Can you state who the members of the committee were who made that report?—No, I have not the report here; it is signed Benj<sup>n</sup> Edward Hall; it is customary for the chairman of the committee of accounts to sign the report.

652. *Mr. Williams.*] Does it appear from your minute who moved the resolution for approving of that report?—No.

653. *Sir G. Strickland.*] Do you know the means by which they ascertained the overcharge of mileage?—No, that is a matter for the committee.

654. *Mr. G. Knight.*] Was the payment for mileage fixed at that time?—It was fixed by Act of Parliament, by the statute of George the Second; it is only the expenses paid to the witnesses which have been lately fixed.

655. There could be no doubt about the amount?—No, there could be no doubt as to the amount per mile. There is another resolution: "Resolved, also, that the payment of the account presented by the coroners at the present session be postponed for the purpose mentioned in the said report, and that hereafter no payment be allowed to constables when there is a salaried constable in the parish, as recommended in the said report." The committee recommended that the account should be postponed to ascertain how far a certain order of the court had been complied with as to the payment of salaried constables.

656. *Mr. Wakley.*] The report had previously directed that no constables or parochial officers receiving regular salaries or wages should be paid?—Yes.

657. So that in the schedule that was attached to the report, payment was to be withheld from the constable if he received a salary; in the order you have just read from the minute-book, payment was to be withheld from the constable, if there was a constable receiving a salary in the parish?—Yes.

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658. *Chairman.*]

Mr. H. Edmonds

16 June 1840.

Mr. H. Edmondson.

16 June 1840.

658. *Chairman.*] What was the next proceeding of the court?—The 20th of February 1840; there is an account referring to inquisitions taken by the coroner for the Duchy of Lancaster; the committee of accounts reported as follows: “Your committee report that an account has been laid before them for inquisitions taken by Thomas Higgs, Esq., coroner of the liberties of the Duchy of Lancaster, from the 19th of September 1838 to the 12th of November 1839; namely, 28 inquisitions, 37*l.* 6*s.* 8*d.*; 54 miles, 2*l.* 0*s.* 6*d.*; expenses, 36*l.*; total, 75*l.* 7*s.* 2*d.*; and it appearing by the said account that some of the inquisitions have been held by deputy, and that several vouchers were wanting, Mr. Higgs, at the request of your committee, has undertaken to attend the court on the county day with his patent, or an extract from it, and to swear to so much of his said account for which vouchers have not been delivered; and your committee, on condition of his doing so, recommend the said account for payment. The account of Thomas Wakley, Esq., one of the coroners of this county, for inquisitions taken on the view of dead bodies, from the 9th to 28th of December 1839, and from the 30th of December 1839, to the 31st of January 1840, having been examined by your committee, they recommend the court to direct the same to be paid as follows: viz., 9th to 28th December 1839, 50 inquisitions, 66*l.* 13*s.* 4*d.*; 127 miles, 4*l.* 15*s.* 3*d.*; expenses paid, 41*l.* 9*s.*; total, 112*l.* 17*s.* 7*d.*; 30th of December 1839 to 31st January 1840, 63 inquisitions, 84*l.*; 206 miles, 7*l.* 14*s.* 6*d.*; expenses paid, 46*l.* 17*s.*; total, 138*l.* 11*s.* 6*d.* The accounts of William Baker, Esq., the other coroner for this county, for inquisitions taken on the view of dead bodies, from the 10th to the 28th of December 1839, and from the 28th of December 1839 to the 31st of January 1840, having been examined by your committee, they recommend the court to order payment of the same, as follows: 10th to the 28th December 1839, 42 inquisitions, 56*l.*; 99 miles, 3*l.* 14*s.* 3*d.*; expenses paid, 61*l.* 11*s.* 6*d.*; total, 121*l.* 5*s.* 9*d.*; from the 28th of December 1839 to the 31st of January 1840, 79 inquisitions, 105*l.* 6*s.* 8*d.*; 169 miles, 6*l.* 6*s.* 9*d.*; expenses paid, 114*l.* 13*s.* 6*d.*; total, 226*l.* 6*s.* 11*d.* Mr. Higgs having attended with his patent, and sworn to so much of his account for which vouchers have not been delivered; resolved, that the account of Mr. Higgs be paid, and that the clerk of the peace be and he is hereby authorized and directed to issue an order on the county treasurer for the payment to Mr. Higgs of the sum of 75*l.* 7*s.* 2*d.* Upon the motion of John Gibbons, Esq., the same having been seconded, it was resolved, that the above resolution in favour of Mr. Higgs be, and the same is hereby rescinded. Upon the motion of Sir Peter Laurie, knight, the same having been seconded, it was resolved, that so much of the report of the committee for accounts as relates to the coroners’ accounts be referred back to the committee, with instructions to ascertain how many inquests have been held by deputy by any coroner, and to disallow the same. The Rev. Theodore Williams having moved, that the accounts of the coroners for this county and the Duchy of Lancaster in Middlesex be verified upon oath by them in open court, before the same be allowed; and the same having been seconded, it was resolved accordingly.”

659. What is the next minute you have?—The next is the 23d of April 1840; I find it headed “Coroner.” This is a part of the report of a committee on accounts. “William Baker, Esq., fees and mileage, on taking 117 inquisitions on view of dead bodies, from the 27th of January to the 4th of April 1840, 320*l.* 12*s.* 3*d.*” There is a resolution entered, that the clerk of the peace be authorized and directed to issue orders on the county treasurer for the several sums mentioned in the said report, which includes that to the coroner. At the same sessions, on the same 23d of April, the special report of the committee of account and general purposes on the coroners’ accounts, referred back on the 28th of February last, was read. “Your committee report, that in proceeding with the inquiry they deemed it necessary to invite the attendance of the coroner for the Duchy of Lancaster, and the two county coroners, to give information which might enable the committee to form a correct judgment on the matters so referred to them, and that those gentlemen attended accordingly. That with respect to the account of Mr. Higgs, the coroner for the Duchy of Lancaster, for inquests taken from the 29th of September 1838 to the 12th of November 1839, your committee report, that he admitted having taken 17 of those inquests on the following persons by deputy, the fees and expenses of which amounted to 43*l.* 13*s.* 10*d.*” The names are here enumerated. “The attention of your committee having been called to the letters-patent under which Mr. Higgs has acted, and

and the authority being thereby expressly given him to execute the office of coroner by deputy, although the word 'deputy' is omitted, so far as relates to the return of such inquisitions, your committee consider him entitled to the amount, and recommend to the court to re-consider their order for the disallowance. Your committee further report, that upon Mr. Baker being asked whether the inquests charged for in his account, from the 10th of December 1839 to the 31st of January 1840, were held by deputy, he replied that there were none, and that he had not, on any occasion since his appointment as coroner, taken an inquest by deputy."

Mr. H. Edmondson.

16 June 1840.

660. What was the minute of the committee on the same occasion, with reference to the inquests taken by Mr. Wakley?—"Your committee lastly report, that having received Mr. Wakley's admission, that 20 of the inquests charged for in his account, from the 9th of December 1839 to the 31st of January 1840, amounting to 40*l.* 9*s.* 7*d.*, were held by his clerk, Mr. Bell, your committee recommend the court to disallow them;" then follow the names and the amounts. "Resolved, that the order for the disallowance of Mr. Higgs's account, amounting to the sum of 43*l.* 13*s.* 10*d.*, be and the same is hereby rescinded, and that the clerk of the peace be and he is hereby authorized and directed to issue an order on the county treasurer for payment to Mr. Higgs of the sum of 75*l.* 7*s.* 2*d.* Resolved, also, that the clerk of the peace be and he is hereby authorized and directed to issue an order on the county treasurer for payment to Mr. Baker, of the sum of 347*l.* 12*s.* 8*d.* Resolved, also, that 20 of the inquests charged for in Mr. Wakley's account, from the 28th of December 1839 to the 11th of January 1840, amounting to the sum of 40*l.* 9*s.* 7*d.*, be and the same are hereby disallowed. Resolved, also, that the clerk of the peace be and he is hereby authorized and directed to issue an order on the county treasurer for the payment to Mr. Wakley of the sum of 210*l.* 19*s.* 6*d.*, being the amount of Mr. Wakley's charges, subject to the deduction of the said sum of 40*l.* 9*s.* 7*d.* Charles Augustus Tulk, Esq., moved that the resolution of the court of the 16th day of January last for disallowing the charges made by Mr. Wakley, upon taking the inquisition on the body of Henry Coleman, be rescinded; and the Rev. Theodore Williams having seconded the same, Peter Laurie, Esq. moved, by way of amendment, that the said charges be referred back to the committee for accounts and general purposes for re-consideration; and John Gibbon, Esq., having seconded the same, it was put to the vote, and on a division carried; whereupon the said amendment was resolved accordingly." The next transaction was on the 18th of May: "The coroners having presented their accounts, Ordered, that they shall be referred to the committee for accounts and general purposes, to report, and that the court be adjourned at the conclusion of the trials until Thursday, the 28th instant, at 12 o'clock, in order that the coroners may be summoned on that day to be examined by the court, according to the statute, provided the committee for accounts shall think the same necessary; Ordered, that the clerk of the peace do summon the coroners accordingly, having received directions to do it from the chairman of the committee of accounts and general purposes." The next day, the 28th of May 1840: "The coroners having attended pursuant to notice given them by the clerk of the peace, Ordered, that the accounts of the coroners for this county, as corrected by them, and verified upon oath, be referred back to the committee for accounts and general purposes, finally to express their opinion, and to report thereon to the court. Then a report was presented by the committee for accounts and general purposes; the resolution consequent upon that was, that the clerk of the peace be, and he is hereby authorized to issue orders on the county treasurer in favour of the coroners and other parties. Resolved, that whenever the coroner shall hold two inquests at the same place without returning to his residence, he shall be allowed mileage for one inquest only; whenever the coroner shall hold two inquests on the same day at different places, he shall proceed from the place of holding the first inquest to the place of holding the second inquest; he shall be allowed the whole mileage on the first inquest, and the mileage from the first to the second place on the second inquest; and this rule shall extend to all cases, whether the place of holding the first inquest be more or less distant from the coroner's residence than the place of holding the second inquest; whenever the coroner shall hold two inquests the same day, but shall return to his residence between the time of holding the first and second inquest, he shall be allowed the whole mileage on both inquests. Resolved, that the clerk of the peace, and he is hereby authorized and directed to issue an order on the county treasurer for the payment



*Mr. H. Edmundes.* to Mr. Wakley of the sum of 2 *l.* 8 *s.* 2 *d.*, being the charge made by him for holding an inquest on the body of Henry Coleman ;” those are the whole. This last proceeding was on the 4th of June.

16 June 1840.

661. *Mr. Wakley.*] Have you examined the coroners’ accounts which are in your custody, from 1820 up to the end of the year 1838?—I have.

662. Will you state what deductions you find in the accounts for those 18 years?—I find an account of Mr. John Wright Unwin, one of the coroners for the county of Middlesex ; from the 19th of January 1823 to the 2d of April 1823 I find an entry : deduct, number 23, inquisition not returned, 1 *l.* 1 *s.* 6 *d.* ; then there is a note, that the amount of this bill is 70 *l.* 3 *s.* 3 *d.* ; the inquisition, number 23, having been returned to the Old Bailey, being a case of murder. In order to explain this transaction, I must refer to the minute-book of that period. There appears to have been a deduction made in error, and that was allowed at a subsequent session ; the order for the payment to Mr. Unwin of 61 *l.* 1 *s.* 9 *d.* was in April 1823. In June 1823, which was the next quarter session, there is an order for the payment of inquests taken on the view of dead bodies, being 22 in number, from the 5th of April to the 19th of June 1823, including the sum of 9 *l.* 1 *s.* 3 *d.* deducted in error from the account of the last quarter’s account, that was paid the subsequent session.

663. So that in reality there was no deduction permanently made?—No ; it was afterwards allowed. The next deduction I find from Mr. Baker’s account in October 1830.

664. Was that permanently retained?—I apprehend it was ; for I find, his charge being 32 *l.* 14 *s.* 3 *d.*, which is the sum endorsed on the inquisition, there is written beneath that, “deduct overcharges in mileage 9 *s.*”

665. Is that the first account after Mr. Baker was elected?—I think it was so ; the sum they paid was 32 *l.* 5 *s.* 3 *d.* On reference to the minute-book of the court, I find an order made for the payment *minus* that deduction. The next account to which I would advert is one of Mr. Baker’s. Mr. Baker sent in an account, a large part of which was struck out ; by whom that was done does not appear. I see these same items were at the head of the second account, therefore I apprehend Mr. Baker must have corrected his own account. The first names in the subsequent account are Thomas Symonds, Mary Ann Buckley, and so on ; that appears to have been a correction by Mr. Baker himself.

666. The only deduction you have found permanently retained, during the 18 years referred to, is the sum of 9 *s.*, in the first account which was sent in by Mr. Baker in 1830?—Yes ; there was one in October 1832, an account that I could not find ; that is the only one I have not examined.

667. Colonel *T. Wood.*] Do those accounts exhibit an increase in the number of inquests?—I cannot answer that question precisely without referring to them from the proceedings of the court ; I have reason to believe that the inquests have increased.

668. *Mr. Wakley.*] Do you find that there has been a different mode adopted in framing the accounts which have been sent in by Mr. Wakley, from those which have been sent in by his predecessor, Mr. Stirling?—I have not examined them with sufficient minuteness to ascertain the difference.

669. Do you find them to be in the same handwriting?—I find one of Mr. Stirling’s, and another of Mr. Wakley’s, to be in the same handwriting ; another I have taken up is in a different handwriting.

670. Do you know whether that is in the handwriting of the son of Mr. Stirling’s clerk?—I cannot say.

671. Do you find, previously to the year 1839, any deductions which have been made in the coroner’s accounts in consequence of any of the inquests having been held by deputy?—No.

672. Do you find any deductions which have ever been made in the coroner’s accounts in consequence of inquisitions having been quashed in the Court of Queen’s Bench?—I have not found any instance of that.

673. Have you any minutes of the court which refer to an application which was made to the Lord Chancellor in January or February in the year 1839, with respect to the election of a third coroner for the county?—Yes, there are such minutes ; I have them here.

674. Have the goodness to refer to them?—I find this minute of the 5th of February 1839 ; this is the first with relation to the subject : “It was upon the motion of Henry Pownall, Esq., resolved, that it appears to the justices of the peace now present, that the subject of the coronership for this county, so far as  
relates

relates to the number of coroners, ought to be taken into consideration during the present vacancy ; that the court do therefore at its rising adjourn to Thursday, the 7th instant, at one o'clock, at the Sessions House, for the purpose of taking the subject into consideration, and of considering the propriety of an application being made to the Lord Chancellor to increase the number of coroners from two to three ; that special notice of such intended meeting be forthwith given to the several acting magistrates for this county. On the 7th of February the court met pursuant to the notice given on the 5th instant, for the special purpose of taking into consideration the subject of the coronership of this county, so far as relates to the number of coroners, and of considering the propriety of an application to the Lord Chancellor to increase the number of coroners from two to three ; when Henry Pownall, Esq. moved that this court do sanction the petition of the freeholders to the Lord Chancellor to issue his writ for the election of an additional coroner, and that the chairman be requested to convey to his lordship the opinion of the court as to the necessity of the measure ; and Peter Laurie, Esq. having seconded the same, John Wilkes, Esq. moved, by way of amendment, that the court do now adjourn ; and Sir John Scott Lillie, knight, having seconded the same, it was put to the vote, and on a division lost, whereupon the original motion was put to the vote, and on a division carried.

675. Have you the petition of the freeholders ?—It was handed up to the bench ; I do not know what became of it ; it was no document of the court, it was merely a document put in, and I think it was read ; it was then handed up to the bench and I did not see it again.

676. It was a document on parchment ?—I think it was.

677. Do you know whether it was sent to the Lord Chancellor accompanied by the resolution of the court ?—I can only tell from the minutes of the court ; I know nothing personally of what became of it.

678. Do the minutes of the court show how many freeholders signed that petition and who they were ?—No, they do not.

679. *Chairman.*] Are there any further proceedings relative to that matter ?—Yes ; on the 21st of February Sir John Scott Lillie, knight, moved “That the resolutions of the court of the first and second days of the present session be read, and that the answer of the Lord Chancellor, as communicated to the chairman, be entered on the minutes, and the same having been seconded, was put to the vote and carried ; whereupon the said resolutions were carried, and the said entry was resolved accordingly. The chairman stated, that on the morning of the 8th instant he personally communicated to the Lord Chancellor the resolution of the bench, and that his lordship stated, in reply, that as a writ might at any time issue for the election of an additional coroner, it was not necessary to interfere with the pending election, but that he was ready to receive any future application, and direct a writ to issue if it should be made to appear to him that an additional coroner was required ; and his lordship further stated, that the then proceedings of the bench were sufficient notice to the then candidate that such a measure was in contemplation. Thomas Gibson, Esq. gave notice, that on the next county day he should move that the consideration of the question whether it was desirable to increase the number of coroners for this county, and whether any and what other alterations can be made in the office of coroner, be referred to the committee for accounts and general purposes, and that the said committee do report their opinion to this court.”

680. That motion was never made ?—It was not.

681. *Mr. Wakley.*] When the meeting of magistrates took place, on the 7th of February, and when they agreed at that time to apply to the Lord Chancellor for the election of a third coroner, do you know on what day the election for the coroner was appointed to take place in the county ?—No, I do not recollect the exact day.

682. Do you find any minutes in your books in relation to the office of coroner for the county, with the single exception of matters of accounts, until the year 1839 ?—Yes ; there was one order, after the passing of the Act of the 1st of Victoria for the payment of costs, for the coroners to send in their accounts at a certain period, that it might be ascertained what expenses had been charged ; there were standing orders the court made afterwards, that the accounts of the coroners should be given in every session ; I have not observed any other entry.

*Mr. H. Edmondes.*

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Mr. Charles Wright, called in ; and further Examined.

Mr. C. Wright.

16 June 1840.

683. Mr. Williams.] IT appears that there are three classes of items in the coroners' accounts ; the first is the coroner's fee, the next mileage, and the third disbursements out of pocket, the last being under the Act of 1st Victoria. In the evidence which has been given before this Committee, it appears, that in the inquests held by Mr. Wakley and Mr. Baker, from the 14th of October to the 7th of December 1839, the number of inquests held by Mr. Baker was 117, and the disbursements out of pocket amounted to 181*l.* 9*s.* ; the inquests held by Mr. Wakley during the same time were 107, and the disbursements out of pocket 95*l.* 0*s.* 6*d.* ; can you inform the Committee how so great a difference arises in the amount for disbursements out of pocket which had been made by the two coroners ?—No, I cannot from memory.

684. Can you state who can furnish that information ?—I think I can furnish the Committee with it, by going through each voucher.

685. Have you the bills which were sent in by the two coroners ?—No, they are in the possession of the clerk of the peace ; but the bills would not furnish that, they give merely the gross amount of the disbursements in each case.

686. Mr. Aglionby.] What length of time would it take you to prepare that information ?—As to that one account, I think by the next meeting of the Committee I could prepare it.

687. Mr. Williams.] Has the subject of so great a difference in the amount of those particular items attracted the attention of the committee of magistrates who are appointed to examine the accounts ?—In my answers to the Committee, the last time I was here, I stated that I had not drawn the attention of the committee of accounts to the difference in the amount of expenses between Mr. Baker and Mr. Wakley ; I have not called the attention of the committee of accounts to it, but it was observed by the members of the committee themselves.

688. Has not the extraordinary difference in the amount of those disbursements struck you ?—I think I did mention, the last time I was here, that it did strike me, and that it also struck the committee ; several of the committee of accounts observed it.

689. Mr. G. Knight.] Was it your duty in any way to call attention to it ?—No, I do not consider that it was ; there was nothing apparent upon the face of the accounts.

690. Mr. Aglionby.] Were any steps taken, or any inquiries made in consequence of the observation of the members of the committee of accounts ?—Nothing has been done ; it was at the last meeting that it was observed upon.

691. Mr. Williams.] Will you be good enough to furnish the Committee with the items that constitute this difference ?—I will do so.

Mr. Thomas Bell, called in ; and Examined.

Mr. T. Bell.

692. Chairman.] YOU are clerk to Mr. Wakley, the coroner for Middlesex ?—I am.

693. You were clerk to his predecessor ?—I was.

694. Were you so for many years ?—For upwards of 15 years ; I went to him in October 1823, though not permanently engaged to him until January 1824.

695. Mr. Wakley.] Was your brother with Mr. Stirling before you ?—For several years.

696. Was Mr. Stirling, besides being coroner, clerk to the magistrates of the county ?—He was deputy clerk of the peace ; that was not an appointment under the justices ; that appointment was under the clerk of the peace, the clerk of the peace receiving his appointment from the lord-lieutenant of the county, the Duke of Portland ; he was likewise clerk to the justices in committees ; his appointment really was clerk to the visiting justices of the prisons, but he acted as clerk to the committees in general.

697. Mr. Williams.] Was he clerk to the committee for accounts ?—He was during the whole time I knew him.

698. Mr. Wakley.] Were you in the habit of making out his accounts as coroner ?—Always, during the whole time I served him ; the accounts are not all in my handwriting ; my son assisted me in copying them from the books, in a few instances, latterly.

699. Have you since you acted as clerk to Mr. Stirling's successor, made out the accounts for him and sent them to the magistrates ?—I have.

700. Have

700. Have you adopted exactly the same rule in making the charges in the accounts of Mr. Stirling and those of his successor?—In every instance the same, without the slightest alteration or deviation.

701. During the time you acted as clerk to Mr. Stirling, was there any obstacle to the passing or to the payment of his accounts?—None at any time.

702. Since you have acted as clerk to his successor, have you found any difficulties in the passing and the payment of the accounts?—There have been several.

703. Have the charges which met with no objection in the case of Mr. Stirling experienced any objections in the case of his successor?—Yes, in regard to mileage, and I think objections were raised to two inquests.

704. Was there on one occasion a list of 30 inquests given, on which the magistrates required information with respect to the charges?—There were about 30 in number, particularly those under the head of natural deaths.

705. Do you recollect any deduction having been made from an account sent in by Mr. Stirling as coroner?—Not in any instance.

706. Were you in the habit of acting precisely in the case of Mr. Stirling, as you have done for his successor, in performing the duties of clerk and accountant?—Exactly; I had directions to pursue the same steps I had been accustomed to do, and I have adhered to them as strictly as possible, that there should not be the slightest alteration in the line of conduct pursued.

707. You had those instructions from Mr. Stirling's successor?—Yes.

708. Were you in the habit of taking inquests for Mr. Stirling?—I was.

709. During how many years?—During the whole 15 years, commencing even in the first year of my service 1824.

710. When you have been holding inquests as deputy for Mr. Stirling, do you recollect whether any of the magistrates happened on any occasion to be present?—I recollect on one occasion, a few years back, a magistrate being in the house when an inquest was held; I do not mean that he attended during the whole sitting, but he was in the house, and knew of the proceeding which was going forward; that was at Stanwell; Sir John Gibbons is the magistrate to whom I allude.

711. Was there the least secrecy observed in your taking inquests for Mr. Stirling?—Never, in any degree.

712. Did you take them in all parts of the county for him?—In most parts of the county; in almost every parish I have been.

713. For a series of years?—The whole of the time.

714. Mr. G. Knight.] Was he during a great part of that time in good health?—He was generally in good health; occasionally I took them in consequence of his indisposition, but not always; sometimes from his absence; he very seldom absented himself from the county, but he did occasionally.

715. When you were so doing, were you aware that it was illegal?—I was aware that there was no statute law to forbid it, and that there was none in favour of it; I think there is a great doubt whether it was right.

716. All the while you were doing it, you were aware that it was doubtful, in point of law, whether it was right or not?—Certainly.

717. You did it in conformity with his orders?—With his instructions; I never acted but under his instructions.

718. Mr. Wakley.] Do you happen to know what Mr. Stirling's own opinion on the subject was?—His own opinion was, that a deputy could not be legally appointed.

719. Chairman.] Are you aware whether it is the practice in other counties for coroners to employ deputies?—In many it is.

720. Have you ever heard of the legality of that being called in question in other counties?—I recollect some cases where inquests had been held by deputy, where that question has been raised, with others, as to the thing being legal; but the inquisition has been set aside on other grounds, leaving the question as to the deputy uncertain.

721. Mr. G. Knight.] You do recollect the question being raised?—Yes.

722. Mr. Williams.] Was the fact of your holding inquests for Mr. Stirling well known to the magistrates?—I think it was very well known.

723. Was any exception taken to it?—Never, to my knowledge.

724. How many inquests on an average, in the course of a year, were held by you as deputy?—I think in the last year of his life I took 37.

*Mr. T. Bell.*

16 June 1840.

725. *Mr. G. Knight.*] He was very infirm during the last year?—Within the last fortnight of his life I took eight or ten, which increased the number.

726. *Mr. Wakley.*] The first year you were with Mr. Stirling, did you take as many inquests for him as during the latter years of his life?—Perhaps not during the first year; but after four or five years' service I think I took more than I took in the latter years of his life.

727. *Mr. G. Knight.*] Do you know that the magistrates at that time were acquainted with this practice of Mr. Stirling?—I know that several were.

728. *Mr. Wakley.*] Did they ever raise any objection to the practice?—Never, that I ever heard, directly or indirectly.

729. *Mr. Williams.*] Did any conversation take place between you and any of the magistrates upon the subject?—I recollect that one of the magistrates, who is now dead, when the subject of inquests was being talked of in the committee, turned round and said, "Mr. Bell takes all Mr. Stirling's inquests."

730. Was that observation made before a committee of magistrates?—Yes; it was made in the committee.

731. Was any observation made by the other magistrates?—I do not recollect any observation being made by them; but my answer to it was, "Not all, sir."

732. *Chairman.*] Did you ever understand that any magistrates entertained a doubt of the legality of this?—I never heard the question raised; I was never present when it was made the subject of question.

733. *Mr. Wakley.*] Did you find Mr. Stirling in all his practice and dealings to be a high-minded and conscientious man?—Very much so.

734. Was he a man very much respected by the magistrates and in society?—I think very much respected indeed.

735. Do you happen to know whether the inquests were taken, during any part of the time that you were clerk to Mr. Stirling, in the house of correction by deputy?—Yes.

736. Do you know whether any objection was ever taken by the magistrates to that practice being pursued in the house of correction?—I know of none; during the whole time of my service with Mr. Stirling I kept the minute-book of the visiting justices of the house of correction and the new prison, and there was never any minute referring to the subject passed through my hands or before my eyes.

737. There was no complaint made?—No, never to my knowledge.

738. Do you know in what proportion the inquests were taken by deputy in the house of correction?—I cannot answer that question; but I never saw Mr. Unwin there, the coroner at that time, the predecessor of Mr. Baker, the present coroner; Mr. Unwin's son was the only person I ever saw there acting as coroner in Mr. Unwin's time.

739. You saw his son acting there as his deputy?—Yes.

740. Have you seen him frequently?—I have seen him a few times only when inquests were held there; but I have no doubt he was there generally, although I cannot say that I have seen him on all the occasions.

741. Were you ever informed by the officers that Mr. Unwin himself, while coroner, had taken a single inquest there?—No, I do not recollect that he had done so; though I should think he had, probably.

742. Were the inquests which were held by you ever noticed in the newspapers?—Sometimes.

743. Were they represented in the reports as taken by you as deputy for Mr. Stirling?—Yes, I have read them myself.

744. *Chairman.*] Was the practice ever commented upon in the newspapers?—Never, to my knowledge.

745. *Mr. Wakley.*] Do you believe that Mr. Stirling, from what you knew of him, would have required that you should take inquests for him if he had thought it was illegal?—I have understood from him that it was an unsettled point, but I knew that he took custom as his rule; in this instance he knew that deputies were acting elsewhere; at that very time I knew of several that were acting, even very close to his jurisdiction, in the very neighbouring districts; I believe he considered there was nothing morally wrong in it, though there was nothing to warrant its legality excepting custom.

746. Do you happen to know that no objection to that custom was ever raised by the magistrates, or mooted by them, until Mr. Wakley was elected to the office of coroner?—Certainly not, or I think I must have heard it.

747. What

747. What inquests have you taken for Mr. Wakley since he was elected to the office of coroner?—I think 22.

748. When was the first one taken?—On the 2d of September there were two taken before one jury at the same place.

749. Mr. Williams.] When you took those inquests for Mr. Wakley, was he at the time himself unable to attend from illness or some other cause?—I think it was on a Monday, but I cannot say positively the day of the week; Mr. Wakley had been out of town, or was out of town; I cannot assign the reason; but I got directions from him to take those two inquests, which I did; they were the first I took for him as deputy.

750. Did you receive instructions from Mr. Wakley, in case of his not returning to town before the time appointed for the holding of those inquests, to take them yourself?—I did.

751. Will you state as to the other 20 inquests, whether Mr. Wakley was unable to attend from any cause?—He was confined to the house by illness.

752. He was quite incapable of holding the inquests himself, personally?—He was.

753. Were those inquests held on continuous days?—They were.

754. Chairman.] Was that the only period during which you held inquests as deputy for Mr. Wakley?—That period was from the 28th of December 1839, to the 11th of January 1840, during the indisposition of Mr. Wakley.

755. Mr. Wakley.] Did you ever hold an inquest for me after that period?—Never.

756. Did you hold any inquest for me before that time, with the exception of the two on the 2d of September 1839?—Never.

757. Were the fees and expenses on those inquests, amounting to 40*l.*, disallowed by the magistrates?—The fees, the mileage, and the disbursements were all disallowed.

758. Mr. Williams.] When you took inquests for Mr. Stirling, were you required to do so on account of his being ill, or unable to perform the duty himself?—Sometimes it was on account of indisposition, but not generally; he was a man in very good health for an aged man.

759. When you took inquests for him as deputy, he was performing the duties of other offices he held?—Yes, more generally; that was the reason of my acting for him; it was from what we call a press of business; he was very particular, in allowing me to take inquests, that they should be of a general description, not likely to amount to any thing serious; in cases of murder or manslaughter I never was sent, but in ordinary cases I acted; the accounts have been made out for the last 50 or 60 years, to my knowledge, precisely in the way they are made out by the present coroner.

760. Chairman.] During the whole period to which you allude, have you reason to believe that the duty of the coroner was discharged by deputy in the county of Middlesex?—Certainly.

761. That had been an immemorial practice?—I trace it for a long time back; Mr. Unwin, we know, took them by deputy; he was Mr. Baker's predecessor; and Mr. Hodgson, Mr. Stirling's predecessor, did so too.

762. What was the rule adopted in paying Mr. Stirling's mileage?—The charge for mileage, and the form of making out the account, were the same as they had been for perhaps 50 or 60 years past, charging so much for the fee and the mileage on a certain rule, which has continued to be acted on till the present period, when a new rule has been adopted.

763. Mr. Wakley.] Did the magistrates in the case of Mr. Stirling's successor reverse the rule which was adopted in the case of Mr. Stirling with regard to the charge for mileage?—It is reversed; at least it is altered.

764. What was the mode of charge adopted in the time of Mr. Stirling?—That of charging from his place of abode to the place of holding the inquest, in all cases; whether there was one or more inquests, charging to the place of holding the inquests, outward only.

765. What is the rule adopted with reference to Mr. Stirling's successor?—I understand the order of the court to be, that if he drive from home to point A., the coroner is to charge that distance; if he go from A. to B. without returning home, he is to charge from A. to B., and from B. to C., and not to charge from his place of abode to each place.

Mr. T. Bell.  
16 June 1840.

766. You say that a list of inquests was sent to the coroner requiring explanations; had you made the appointments for holding those inquests in conformity with the same rule that you adopted in the case of Mr. Stirling?—I believe in every case, excepting one, without altering the rule or plan in the slightest degree.

767. Mr. Williams.] Do you happen to know whether Mr. Stirling's successor during the first year of his being in the office took as many inquests as were taken by Mr. Stirling in the last year of his life?—Mr. Wakley's were fewer in number.

768. Mr. Wakley.] Had there been at the time the magistrates appointed the committee to inquire into the causes of the increase of inquests, a less number taken by Mr. Stirling's successor than by Mr. Stirling during the two corresponding periods of the last year of Mr. Stirling's life and the first year of office of his successor?—I think that at about that time, when Mr. Wakley's account had gone on up to 12 months, and when the first objections arose, the numbers were less.

769. Chairman.] Has there been a considerable fluctuation in the number of inquests, or has it been progressively increasing on the whole with the increase of population?—It has progressively increased, taking the inquests in the county at large; in Mr. Wakley's division there has been a decrease since his appointment.

Veneris, 26<sup>a</sup> die Junii, 1840.

MEMBERS PRESENT :

Mr. Wakley.  
Mr. Williams.  
Lord Eliot.  
Mr. T. Duncombe.

Sir George Strickland.  
Mr. Gally Knight.  
Mr. Mackinnon.

LORD TEIGNMOUTH IN THE CHAIR.

Peter Laurie, Esq., called in ; and Examined.

Peter Laurie, Esq.  
26 June 1840.

770. Chairman.] YOU are a magistrate of the county of Middlesex?—I am.

771. I believe you have held that office for some years?—For about nine years.

772. Mr. Wakley.] Have you been in the habit of auditing the accounts for many years?—No, I have not; I have only attended that committee latterly, the committee of accounts; I have attended occasionally, but certainly not regularly.

773. When did you commence your regular attendance on the audit committee?—I cannot say that I regularly attended the committee at all; I have attended more frequently since October last, when my attention was drawn to the coroners' accounts; I used to attend before that occasionally.

774. Your attendance then became regular, with reference to the coroners' accounts?—Yes.

775. Do you recollect when the last vacancy in the office of coroner occurred in this county?—I do not recollect the date; I recollect the circumstance.

776. Can you say whether it was in the early part of the year 1839?—It must have been the early part of 1839; I think it was about January.

777. Was there any application made at that time to the Lord Chancellor for the election of a third coroner?—Yes, there was.

778. Can you recollect what was the nature of the proceedings?—Not very distinctly; as well as I can recollect, there was a memorial from certain freeholders presented to the court of quarter sessions, I think, by Mr. Pownall, for the purpose of calling the attention of the court to the necessity of the appointment of



of a third coroner; I believe the Act of Parliament requires the application should be made to the Chancellor by the court of quarter sessions, and this memorial of the freeholders was for the purpose of putting the court of quarter sessions in motion.

*Peter Laurie, Esq.*

26 June 1840.

779. Do you recollect by how many freeholders that memorial was signed?—I do not know, but I think a very small number; it was considered more a formal application, for the purpose of mooted the question, than any thing else.

780. Do you recollect whether it was 12, 15 or 20?—No, but I think it was under 20; I was not one of them.

781. Where can a copy of that memorial be had?—I should apprehend, from the clerk of the peace.

782. Was the memorial forwarded to the Lord Chancellor?—It must have been, because there was an answer.

783. With the resolution of the court?—Yes.

784. On what ground was it sought to obtain the election of a third coroner?—One of the grounds was, it was then thought necessary to have a third, in consequence of the great number of inquests which were held. I believe a calculation was made, by which it was shown each coroner must hold, on an average, two inquests a day, which was considered more than he could properly hold on an average.

785. Was any complaint made, on that occasion, of the increase of inquests?—That was the ground of application.

786. Was there any complaint made that any unnecessary inquests had been held?—There was no complaint from any individual; that was the allegation in that memorial that the business was too great to be discharged properly by two, and that an appointment of a third was advisable.

787. And the magistrates in session, in consequence of the presentation of that memorial, addressed the Lord Chancellor and asked the Lord Chancellor to issue his precept accordingly?—They did.

788. Do you recollect whether at that time any complaint was made that unnecessary inquests had been taken in the county?—I do not recollect any such statement having been made.

789. Do you recollect whether you were one of the movers or seconders of the resolution for the application to the Lord Chancellor?—I do not think I either moved or seconded it; I recollect supporting it, certainly.

790. You spoke in favour of it?—Certainly.

791. Was that within a few days of the election that was appointed to take place?—I should think so; it was after the vacancy, and this must have been within a few days of the election of the successor.

792. Can you recollect on what day it was?—I cannot; it was a county day and must have been on a Thursday; I was not aware that such an application would be made when I went into the court, and I neither moved or seconded it, in all probability.

793. Had you previously to that time placed your name to a requisition in favour of Mr. Burchell?—I dare say I might have signed the requisition, but I do not know; I did not vote at the election at all.

794. Did you in September 1839 bring before the magistrates in session the subject of the increase of inquests in the county?—Either in September or in October.

795. Do you recollect when the subject of the coroners' accounts was before the court in October, moving any resolution on the subject?—I do.

796. You moved two resolutions, I believe; one with respect to the accounts, and the other for the appointment of a select committee?—Yes, I did.

797. Do you recollect what was the purport of the resolution respecting the accounts?—I do not recollect the terms of it; the effect was that the accounts should be referred back generally for reconsideration, and for the purpose of having additional vouchers; I think it was.

798. Was it not that they should not be paid, and that they should be referred back to the committee of accounts for the want of sufficient vouchers?—Perhaps those might be the terms; I cannot say precisely. That must have been on the 10th of October, as I find by reference to a report of the committee.

Peter Laurie, Esq.

26 June 1840.

799. Do you ever recollect any coroner's account being so referred on any previous occasion?—I do not.

800. Can you state what were the vouchers that were wanting in those accounts?—There were no vouchers, as far as I recollect, from the medical men with respect to the allowance to medical witnesses, or there were no sufficient vouchers; there may be some difference of opinion with respect to what are called vouchers in this matter; I conceive the depositions to be vouchers, believing that the justices are the persons who have to judge of the propriety and of the necessity of the inquests having been held; and as that, in my opinion, could only be judged of properly by the depositions, I consider the depositions in that case to be vouchers.

801. In the account which Mr. Wakley, the coroner, had sent in on that occasion, was any voucher absent from the account which had been usually supplied by his predecessors?—Not having attended the audit of the accounts of his predecessors, I am not able to say.

802. But having made that motion in open court and in the face of the county, that is, having referred the account back to the finance committee for the want of vouchers, did you send to the two coroners requiring them to produce any additional vouchers, and specifying what they were?—We required their attendance, and we required as vouchers their depositions, which they both objected to produce, more especially Mr. Wakley, who stated that he would not produce them until he had taken advice; they were afterwards produced by both the coroners.

803. Are you not confounding the proceedings before the two committees?—Perhaps I am; but they are so intimately connected that that may account for my having given the last answer.

804. I ask you whether the depositions were asked for at all before the finance committee; that is, the committee of accounts?—I think they were, but I cannot be positive; I know they were before the committee which was appointed to inquire into the increase of inquests on the 10th of October last, and of which I was chairman.

805. Can you now describe a single voucher which was wanting in the account of Mr. Wakley?—Yes, the depositions were wanting until we called for them. Are you speaking of the finance committee?

806. Yes; I am confining myself entirely now to the finance committee.—As far as my memory serves me, they were required at the finance committee; but, as I stated before, I am not positive on that point; I think there was a deficiency of such vouchers as are required by the Act of Parliament, namely, that the attendance of a medical man for a *post-mortem* examination should, in certain instances, be required by a majority of the jury in writing; and I thought at the time they were not sufficient.

807. From your speech made at that time, you appear to entertain a view that a coroner cannot summon a medical man without having the concurrence of the majority of the jury; was that so?—I do not recollect sufficiently; I might have so stated; but I am now aware, after looking at the Act of Parliament more particularly, the coroner has the power of sending for a medical man to perform a *post-mortem* examination, if he should consider it necessary.

808. Have you any book or record which will show any single additional voucher was demanded or supplied, with reference to that account?—I have none; the clerk of the committee would be the person who can give more accurate information on that point.

809. Would the minute-books of the committee show whether such vouchers had been furnished, if they were furnished?—I really cannot say whether such a requisition would be considered of sufficient importance to form the subject of a distinct minute or not.

810. But as to refer back to a public officer's accounts for the want of sufficient vouchers was a very strong measure, did the magistrates in session adopt your resolution merely upon general terms, or upon a specification of any vouchers which were wanting?—I think that the grounds which induced the court to refer the subject generally to the committee was for the purpose of inquiring generally into the great increase of inquests which appeared to have taken place.

811. Are you not again confounding what passed with reference to the two committees?—No, I do not think so.

812. Were not the coroners' accounts referred back to the finance committee?—Certainly.

813. Did

813. Did you at the same meeting of the court, or subsequently, move that a committee should be appointed to inquire into the increase of inquests?—If it was not included in one resolution, the resolution for the appointment of a select committee was immediately following the other one; it arose entirely out of the discussion that took place in the first instance.

*Peter Laurie, Esq.*

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814. Were both of those motions made and carried without any previous notice having been given of them?—Certainly they were.

815. *Chairman.*] Was any statement laid before the magistrates on that occasion as the groundwork of those motions?—The way in which it arose was this: at the quarter sessions (I think this was a quarter session) the committee of accounts make a general report of the claims due on the county; the coroners' accounts form part of that; they recommend certain accounts for payment; of course a discussion may arise on any one of the items; it did on the coroners' accounts, which formed part of their recommendation.

816. And was there a report made by that committee?—Yes.

817. Is the report now shown to you, dated 31st October 1839, the report of the committee?—Yes.

818. Did the statements which were laid before the magistrates comprise a return of the number of inquests held for some time past?—Yes.

819. Did that indicate a progressive increase on the whole?—Yes.

820. Up to what time?—Up to the latest period that could be obtained.

821. *Mr. Wakley.*] Was it up to the time of making the motion?—No, up to the time referred to in the report of the committee of accounts, who recommended the payments.

822. *Chairman.*] That was to the 14th of September 1839?—Yes.

823. Had not the increase of inquests up to that period been progressive?—Yes, it had from 1834, I think.

824. Had that increase of inquests attracted for some time the attention of the magistrates?—I do not think it had attracted the attention of the magistrates; I think the attention of the magistrates was drawn to it by the remarks in the public papers, as to the frequency of inquests; complaints appeared in the papers that unnecessary inquests were held, and the frequency of inquests was also complained of, and my attention was drawn to it certainly from the public press.

825. Up to that period you had given no particular attention to the subject?—No, I had not.

826. *Mr. Wakley.*] You have stated in your answer that the number of inquests had progressively increased from 1834 to the 14th of September 1839?—There is not an actual increase every year; so that it is not, strictly speaking, a progressive increase; there is a very considerable increase in 1839 as compared with 1834.

827. *Mr. Williams.*] Has not a considerable increase of population taken place between those two periods, from 1834 to 1839?—There has of course been an increase, but not to any very great amount, I should think; the rapid increase of inquests took place in 1838, in both divisions of the county.

828. Was that during the period Mr. Stirling was coroner?—Yes.

829. What are the number of inquests in 1838 as compared with the number in 1839?—I cannot state that, because that account, which I hold in my hand, is only made up to the 14th September 1839; I can tell you the number of inquests that were held by both coroners in 1837 and 1838, which will show the increase I refer to.

830. *Mr. Mackinnon.*] What are the numbers?—In 1837, the number of inquests held by Mr. Stirling was 538; in 1838, the number was 736; in 1837, the number of inquests held by Mr. Baker was 602; and in the following year, 1838, 777.

831. *Mr. Williams.*] You would have the means of stating the number of inquests in 1839?—Yes.

832. Can you furnish that information?—Yes.

833. *Mr. Mackinnon.*] In what way do you account for the great increase of inquests in 1838, compared to what there were in 1837?—I attribute it principally to the payment of the constables; the payment of the constables was settled by the court of quarter sessions, on the 7th of November 1837; and by that schedule a fee of 7s. 6d. was allowed to a constable for giving information to the

coroner

## 56 MINUTES OF EVIDENCE BEFORE SELECT COMMITTEE

*Peter Laurie, Esq.* coroner, and summoning the jury, and that, in my opinion, is the main cause of the increase of inquests.

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834. *Mr. Williams.*] Was there no regard had to the distance the constable had to come to the coroner's office, in regard to the charge?—If it exceeded a certain distance, he received mileage in addition.

835. *Mr. Mackinnon.*] The constable did?—Yes; if he resided within two miles of the coroner's office, he did not receive any mileage; beyond that, he received 3*d.* a mile each way.

*Mr. Charles Wright*, again called in; and Examined.

*Mr. C. Wright.*

836. *Mr. Williams.*] WHEN you last gave evidence before the Committee, you were requested to put in certain returns, to account for the difference in the charges made by *Mr. Baker* and *Mr. Wakley*; have you prepared those accounts?—I have.

837. Will you hand them in?—These are the returns.

[*The Witness hands in the same, which are as follows:*]

AN ANALYSIS of the ACCOUNT of DISBURSEMENTS made under the Authority of the Act of the 1st Victoria, cap. 68, from the 14th of October 1839 to the 7th December following, by *Thomas Wakley, Esq.*, one of the Coroners of the County of Middlesex, upon taking 107 Inquisitions.

Constables Summoning Juries and for Attendances.	Inquest Rooms and for receiving Dead Bodies.	Medical Witnesses.	Other Witnesses.	Total Amount Paid.
£. s. d. 45 5 6	£. s. d. 16 19 -	£. s. d. 16 16 -	£. s. d. 16 - -	£. s. d. 95 - 6

AVERAGE AMOUNT paid in each Case.

Constables Summoning Juries and for Attendances.	Inquest Rooms and for receiving Dead Bodies.	Medical Witnesses.	Other Witnesses.	Total Average Amount Paid in each Case.
£. s. d. - 8 5½	£. s. d. - 3 2	£. s. d. - 3 1½	£. s. d. - 2 11½	£. s. d. - 17 9

AN ANALYSIS of the ACCOUNT of DISBURSEMENTS made under the Authority of the Act of the 1st Victoria, cap. 68, from the 14th of October 1839 to the 7th of December following, by *William Baker, Esq.*, one of the Coroners of the County of Middlesex, upon taking 117 Inquisitions.

Constables Summoning Juries and for Attendances.	Inquest Rooms and for receiving Dead Bodies.	Medical Witnesses.	Other Witnesses.	Total Amount Paid.
£. s. d. 47 1 -	£. s. d. 24 10 -	£. s. d. 87 3 -	£. s. d. 22 15 -	£. s. d. 181 9 -

AVERAGE AMOUNT paid in each Case.

Constables Summoning Juries and for Attendances.	Inquest Rooms and for receiving Dead Bodies.	Medical Witnesses.	Other Witnesses.	Total Average Amount Paid in each Case.
£. s. d. - 8 -½	£. s. d. - 4 2½	£. s. d. - 14 10½	£. s. d. - 3 10½	£. s. d. 1 11 -

838. What

Mr. C. Wright.

26 June 1840.

838. What are the periods which those returns embrace?—From the 14th October 1839 to the 7th December 1839.

839. Do the tables which you have now produced exhibit a correct analysis of the accounts of the coroners for the periods therein stated?—They do.

840. Are you certain that the extraordinary difference which exists in the payments charged, as having been made to medical witnesses by Mr. Wakley and Mr. Baker, has not given rise to any proceedings on the part of the magistrates?—It has been a matter of conversation in the committee; nothing has been done upon it.

841. Has no resolution been adopted by the magistrates on the subject of that remarkable difference?—Not any in the committee.

842. No resolution adopted by way either of commendation on the smallness of Mr. Wakley's charges for medical witnesses, or of remonstrance against those in the account of Mr. Baker?—There has not.

843. And yet the difference in the charges of the two coroners amounts in the period of seven weeks and five days, from the 14th October to the 7th December 1839, to as much as 70*l.* 7*s.* charged by Mr. Baker for medical witnesses more than was charged in the same period by Mr. Wakley?—It is the sum shown there, and I believe that is the amount.

844. According to the return which I hold in my hand, made about six months since to the House of Commons by the coroners of Middlesex, it appears the extreme length and breadth of the district of the county in which Mr. Baker acts as coroner is 18 miles by four-and-a-half; the extreme length and breadth of the district in which Mr. Wakley presides is 26 miles by 25 miles, giving in one case 81 square miles, and in the other 650 square miles; the space, therefore, over which Mr. Wakley performs the duties of coroner is eight times larger than that occupied by the eastern division of the county; the constables who came to Mr. Wakley's office giving notice of inquests, and who afterwards summon the parties and attend the inquest, and who are paid for their journeys to the coroner's office by the mileage that they travel, must have much larger charges to make for mileage than those in the eastern division; yet in the analysis of Mr. Wakley's account, the amount charged for payment to constables during the period from the 14th October to the 17th December 1839 is less than the corresponding charges in the account of Mr. Baker for the same interval—47*l.* 1*s.* 6*d.* in Mr. Baker's, and 45*l.* 1*s.* 6*d.* in that of Mr. Wakley's—is not that so?—It appears by that analysis that that is the case.

845. Has this difference been the subject of any resolution of commendation as regards the economy of Mr. Wakley's charges for constables on the part of the magistrates?—It has not.

846. And of no notice in any other form?—It has attracted the notice of the committee; but no steps have been taken on the difference being observed.

847. Have they expressed no opinion that steps ought to have been taken when so great a difference in the particular item appears in the accounts?—No, the committee have not expressed any opinion on the subject.

848. Mr. Mackinnon.] Can you account for the discrepancy or difference in the charges here?—No, I cannot.

849. Have you heard any reason ever given?—No, I have not.

850. That being the case, how comes it it was not noticed by the magistrates or by the committee?—It has been matter of conversation; it has attracted the notice of individual members of the committee; but no steps have been taken by the committee.

851. Mr. G. Knight.] Did they not consider it of importance enough to take steps upon?—They must have considered it an important matter; but it rested entirely with the coroner; they took it for granted he would not make any improper payment under that schedule.

852. Mr. Mackinnon.] The magistrates being guardians of the public, if there had been any thing improper, would they not have noticed it particularly?—If there had been any thing irregular; they took it for granted they were all regular payments under the schedule, settled by them in the sessions.

853. Your impression is that the charges were all regular?—Yes.

854. And on that account were not noticed by the magistrates or by the committee?—It was not noticed by the committee.

549.

H

855. Chairman.]

Mr. C. Wright.

26 June 1840.

855. *Chairman.*] The accounts of the coroners were separately examined?—No, not separately, but with other accounts.

856. The accounts of each coroner were separately examined and audited?—Separately examined and audited.

857. If discrepancies had arisen from any overcharge on the part of either coroner, that overcharge would have come under the cognizance of the finance committee?—If it had appeared upon the vouchers, or on the accounts, there had been any irregular charge or payment made by the coroner, it would have been struck out, as a matter of course, by the committee.

858. *Mr. Wakley.*] Do you recollect the accounts of the coroners, in September last, having been referred to the finance committee for the want of sufficient vouchers?—I remember there was an order of the court referring them back to the committee.

859. If any additional vouchers had been demanded, would it have been your duty to make that demand?—No; as it was an order of the court, it would have been more the duty of the clerk of the court; as it was an order of the court that they should have been called for, the clerk of the peace would have been the proper officer to call for them.

860. Were not the accounts referred to the committee for re-examination?—They were.

861. Would it not be before the committee the additional vouchers would be required?—They would be required before the committee.

862. If any vouchers had been wanting, would it have been your duty to have directed the attention of the committee to that subject?—Yes; if it appeared to me any vouchers were wanting, it would have been my duty to mention it to the committee, certainly.

863. Can you name or specify any voucher which was wanting in the account of Mr. Wakley that was so referred back to the committee?—No voucher, in my opinion, as far as that goes, was wanting; at least so far as I remember.

864. Do you recollect making any application to Mr. Wakley for any additional vouchers with regard to that account?—No, I do not.

865. *Mr. Mackinnon.*] In this difference of accounts, either there must have been some neglect in the magistrates, or they must have been satisfied with the account as presented; is that so, in your opinion?—The difference in amount paid to medical witnesses, are you alluding to?

866. As to the general balance of the account; the excess of Mr. Baker's over Mr. Wakley's?—The greater part of the difference is in the amounts paid to medical witnesses; it was quite a matter of discretion with the coroner whether he would call medical witnesses on each case.

867. Is the other coroner a medical man?—Mr. Baker is not.

868. Then there is an advantage in having a medical man a coroner?—Why, I cannot answer that question.

869. *Mr. Williams.*] The difference being so remarkable, as the charge of only 16*l.* 16*s.* on 107 inquests made by Mr. Wakley, and 87*l.* 3*s.* made by Mr. Baker on 117 inquests during the same period of time, is it not surprising it has not struck the magistrates there was something wrong?—I have already said it did strike some of the magistrates, but there were no steps taken by the committee.

870. Was not the cause of such a great difference in the charge deemed a subject worthy of inquiry?—No inquiry followed.

*Peter Laurie, Esq.,* again called in; and Examined.

*Peter Laurie, Esq.*

871. *Mr. Mackinnon.*] AS there has been the increase of inquests which you have stated, in consequence of the fees paid to the constables, either formerly the constables could not have done their duty, or in 1838 they must have exceeded their duty?—Yes.

872. Your answer shows, in consequence of the fees received by the constables, that before they must have been either deficient in their duty, or afterwards rather officious in the performance of it?—It is impossible for me to distinguish between those reasons; it is quite clear there was much greater activity in 1838 than in 1837, and I attribute that certainly to the regular fee of 7*s.* 6*d.* being paid the constable, which, it must appear to the Committee, is an object of some importance to persons in the life that parish constables generally move in.

873. *Chairman.*]

*Peter Laurie, Esq.*

26 June 1840.

873. *Chairman.*] That cause of increase of expense led to the resolution adopted by the magistrates, that the parochial constables or officers receiving fixed salaries or wages shall hereafter receive no fees?—It did; in the metropolitan parishes there are beadles who are the persons who generally give information to the coroners, and who fix the public-houses at which the inquests are to be held; and the committee were of opinion, that inasmuch as they received regular salaries, and the rate-payers had already purchased the whole of their services, it was unjust to the rate-payers that they should be called on to sanction a fee in addition to their regular salaries.

874. *Mr. Wakley.*] Are you aware that the constables and beadles were paid before the Poor Law Amendment Act was passed?—They were paid a very small sum out of the poor-rate, and I also believe they received 1s. or 2s. from the coroner for each inquest.

875. *Mr. Williams.*] Are you aware of the difference in the amount of fees under the regulation of allowing 7s. 6d., and the amount paid previously to constables for giving the information?—I cannot give that information, because it was not paid out of the county-rate previously to the passing of the 1st of Victoria, c. 68; any fees that they did receive were paid out of the poor-rate, and were not paid under the sanction of any Act of Parliament.

876. Are you aware the amount of the fees they received from the poor-rate was less than is now allowed?—It is impossible to say what amount they received at all.

877. Then how can you express an opinion, you consider the increase of inquests to have taken place in consequence of the fee of 7s. 6d. being allowed to them?—For this reason: there was no regular fee allowed at all; whatever fee they received was an irregular and illegal fee; and it is matter of notoriety that the fee of 7s. 6d. was a much larger sum than they received before, generally speaking.

878. You are unable to state exactly what the amount previously received was?—Certainly; it is impossible for me to state the aggregate amount they received under that system.

879. You have stated you considered the increase of inquests to have taken place in consequence of the inducements held out by the fee of 7s. 6d.; but you are unable to state to the Committee what was the amount of fees they received previously to this regulation; is that so?—Yes; but a very large number of the constables did not receive any thing; others received a shilling; others received a small sum from the coroner for giving information.

880. Is the Committee to understand, supposing a death had taken place at Hendon, and the constable was to come to the office of the coroner in London, and give information of that death, that he would not receive a proper remuneration for the trouble he took in giving that information?—I apprehend he would not, under the old system; indeed, it was matter of great complaint that the constables were put to very great expense in consequence of being obliged to travel a considerable distance to give information to the coroners, for which they received no remuneration, and it was principally in consequence of this complaint that that provision was inserted in the Act of Parliament.

881. Does it not appear probable that a great number of cases were suppressed, on which inquests ought to have been holden, because of the great trouble the constable had without proper remuneration?—There has been no proof of that; it is a natural conclusion that a constable would not be so active in giving information when he did not receive remuneration as when he did.

882. *Mr. Wakley.*] Did you take away his fees in order to decrease his activity?—No; we took away his fees only in cases where he received a regular salary; where he was a permanent officer receiving a fixed salary, and when he was bound to do the whole duty.

883. *Mr. G. Knight.*] Have you reason to believe more inquests have been held than you deem necessary since the increase?—I apprehend so.

884. *Chairman.*] The metropolitan police have a concurrent jurisdiction with the parochial constables as to giving notice to the coroners?—Yes, they have.

885. And do you suppose that a large part of the duty formerly performed by the beadles or parochial constables has consequently devolved on the metropolitan police?—No; I think the metropolitan police have not done a great deal in that respect; they have done something, certainly; but I think the duty, especially since the payment of this fee, has principally rested on the parochial beadles; I



*Peter Laurie, Esq.* speak more particularly of the parish in which I reside, Marylebone; a very large parish.  
26 June 1840.

886. But since the withdrawing the fee, the parochial constables are put on the same footing as the metropolitan police?—Yes; and the consequence is this: that the parochial beables now get some of the parish constables who do not receive salaries to give the information, and so receive the fee of 7*s.* 6*d.*, which they would not receive if the information was given by them.

887. They, in fact, consider the parochial constables as their deputies?—Certainly; for the sake of obtaining the 7*s.* 6*d.*, which they would not receive if they gave the information, because under the order of the court they would be considered as salaried officers.

888. Then you think the regulation of the magistrates became in a great measure inoperative?—Inoperative; to such an extent did it become inoperative that the committee came to another resolution, to this effect: that no fee should be allowed to any constable acting for a district for which there was a salaried officer; in order to prevent his shifting the labours upon another person, and so securing the 7*s.* 6*d.*, and, as we conceived, preventing collusion.

889. Your statement with regard to this regulation having been inoperative, applies, in your opinion, to both Mr. Baker's and to Mr. Wakley's districts?—To all those parishes where there are salaried officers, in whichever division of the county it may be; in the metropolis, generally; in the country districts there are no salaried officers, or in very few of them; it relates principally to the great metropolitan parishes, in which there are beables receiving salaries varying from 70*l.* to 100*l.* a year.

890. Mr. *G. Knight.*] Do you mean to say, where the beable deputed the constable, that the beable and constable went shares?—That I cannot say; that was the notion of the committee, and it was on that supposition they came to the second resolution to which I have referred.

891. Mr. *Wakley.*] What do you mean by "a salaried officer"?—I mean a beable being a constable, and the beables are all sworn in as constables.

892. Then the object of your two regulations was to compel the beable or constable, who had a salary, to discharge the duty attending the holding of the inquests without any additional fee or reward for his labour?—Certainly; on the ground that he was a paid officer; that the whole of his time was at the service of the parish, for which he received sufficient remuneration, or else he would not have taken the office, and that the parishioners had the right to the whole of his service.

893. Mr. *G. Knight.*] Are you aware, so far as Mr. Baker was concerned, that the resolution respecting the non-payment of fees to constables has been a dead letter; in short, that he has continued to pay them as if that resolution had not passed?—I am not aware that such is the fact; I should wish to state, that the committee directed their clerk to issue a circular to the various parishes for the purpose of ascertaining whether they had or had not regular salaried officers; that he was to make an abstract of the returns, and forward the list, when made up, to the coroners, in order that they might not make those payments in respect of an inquest held in any of those parishes in which there was a salaried officer.

894. Mr. *Wakley.*] How are those salaried officers paid?—Out of the poor-rate.

895. Did not the Poor Law Commissioners issue a circular in March 1837, directing that the expense of inquests should not be paid out of the poor-rates?—I believe that was so.

896. Were not those payments discontinued in consequence?—Yes.

897. Did not that state of things lead to the enactment of the 1st of Victoria, c. 68?—I presume it did; perhaps I may be allowed to explain: the regulations of the committee do not at all interfere with any order of the Poor Law Commissioners, inasmuch as it was not to sanction any payment at all for the labour which they performed in respect of any inquest; it was to prevent any addition at all being made to that salary which they already received.

898. Do you admit that the constables, in performing their duties on the holding of inquests, perform important and sometimes laborious duties?—Yes, important, but not laborious, I think; however, whatever distance he goes beyond two miles from the coroner's office, he receives a remuneration as mileage.

899. Under what part of your schedule can I now pay any of the constables of Marylebone

Marylebone or Pancras, or any of the great parishes of the metropolis, for mileage or for the performance of any other duty connected with the inquest?—Under this schedule: “The constable, if residing within two miles of the coroner’s office, for giving information to the coroner on an application for a warrant to summon a jury, 1s.; an additional allowance of 3d. per mile for every mile he may be compelled to travel each way, to and fro, beyond the distance of two miles from the place where the body lies to the residence of the coroner; and to procure the warrant for summoning the jury and witnesses, and attending on the coroner during the inquest for part or the whole of the day, 6s. 6d.; and for attendance during a part or the whole of any adjournment-day, 3s. 6d.”

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900. Do you state that any one of those payments can be made to any beadle or constable of the metropolis who is in the receipt of a salary or wages?—They ought not to be, under the order of the court.

901. So that paid constables or beadles are not allowed for mileage, however far they may travel to summon their juries or collect their witnesses?—No, but for this reason; they have no distance to travel for the juries; the jury is summoned from the immediate neighbourhood where the body lies; they are generally from the adjoining streets; instead of travelling miles, it would be a more appropriate expression to speak of yards.

902. *Chairman.*] Is it not on very rare occasions they go out of the neighbourhood?—Exceedingly rare; I am now speaking of the metropolitan parishes.

903. *Mr. Wakley.*] Suppose a metropolitan constable, in the receipt of a regular salary or wages, should have to walk 20 miles to summon his witnesses, can the coroner, under your regulation, legally allow him 1s.?—No, he cannot; but that is an extreme case, which may not happen once in a year; in the vast majority of cases, these inquiries are strictly local; an accident happens in a street, neighbours are the persons who witness it, residents are the jury who are summoned from the immediate neighbourhood; in almost every case they are strictly local.

904. *Chairman.*] Do you not think this resolution works sometimes unfairly?—It is impossible to form any resolution which will not, in certain cases, act unfairly; but, on a general principle, we were of opinion it would act with great fairness.

905. Have you had any complaints?—Certainly; we have had complaints from several constables in Mr. Baker’s division, which of course we expected; we naturally anticipated that the resolution which would have the effect of taking 7s. 6d. out of the pocket of the constable, would be matter of complaint.

906. But it appears in Mr. Baker’s district, from his own statement, this resolution has become a dead letter; whence, therefore, do these complaints originate?—I was not aware it had become a dead letter, and I was the less inclined to think so in consequence of these complaints.

907. Have those complaints been recent, or did they arise soon after the resolution?—The complaint came in the shape of a memorial, praying the court not to come to the resolution to which they afterwards did arrive.

908. Have the complaints diminished in Mr. Baker’s district?—We have heard of no complaints since; I recollect looking over some of the payments to the constables in Mr. Baker’s division, and I recollect in one parish missing the name of the constable that used to summon the jury in that parish; I saw another name, and that officer whose name I missed was certainly a salaried officer; I should state my own opinion is this, that there are no complaints now, because they have found means to evade the regulation.

909. Then, in fact, your answer very much confirms Mr. Baker’s statement, that the regulation has become a dead letter?—Yes, by the evasion.

910. *Mr. Wakley.*] Do you mean, if there be an evasion, that it extends to the western division of the county?—Yes.

911. Do you know of one instance in the western division of the county in which a salaried constable or beadle is paid?—No; I do not charge any evasion on the coroners, I beg to say; but in St. Pancras and in St. Marylebone, although I am not able to give the names, yet I know, from looking over the vouchers, that there are not the names of the regular parish beadles, but that the 7s. 6d. has been paid to a common parochial constable, who before that regulation never would have been called on to perform the duty.

912. *Chairman.*] The evasion is decidedly irregular?—Clearly. The duty is now thrown on the parochial constable, which the parish beadle always discharged before; the beadles knowing this, that if they did the duty they would get nothing for it.

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913. Do you think it a satisfactory state of things that this system of evasion should proceed, and that the apparent fairness of the regulation should be defeated by this mode of proceeding?—Certainly not.

914. *Mr. Wakley.*] Have you examined the coroners' accounts for some months past or for many months?—Not for many months.

915. Can you state a single instance in which a constable in Marylebone or St. Pancras has been paid, or a beadle either, since you have published your regulation?—Not since we came to the last regulation, that no constable should be paid when there was a salaried officer in the parish; but between the time of our coming to the first regulation—that no salaried officer should be paid—and the other to which I have just referred, I certainly recollect seeing payments made to other persons than the regular salaried beadles.

916. Now, I ask you to specify any instance in which a payment in the western district has been made, in your opinion, by evasion and not in accordance with your schedule?—I have already stated I cannot particularize any instance; I have stated I arrived at that opinion generally from looking over the vouchers, and from missing the names, in the parish in which I reside, of the beadles.

917. In what parish do you reside, Marylebone?—Yes, in Marylebone.

918. *Mr. Mackinnon.*] If I understand your evidence aright it is this: the beadles, who are salaried officers, whose duty it would be under your regulations to give notice to the coroner, have anxiously shoved this business off their shoulders on to the constables, and the constables, in consequence of that, have demanded a remuneration, they not being paid officers, which remuneration has increased the expenses?—Yes, just so; and that drove us to the second resolution.

919. *Mr. Williams.*] During the period when, by the regulation of the magistrates, 7s. 6d. was payable to the constable for giving notice of inquests, did either of the coroners hold any inquest in cases where the magistrates thought inquests ought not to have been held?—Yes, in their opinion, they did; they did not come to any distinct resolution to that effect, so as to refuse the payments; but individual members of the committee entertained a strong opinion that several inquests which had been held had been held unnecessarily.

920. Were not a great number of inquests held both by Mr. Wakley and Mr. Baker objected to by one of the finance committees, and referred for further consideration?—Several stood over for want of the vouchers; but I do not recollect above one instance in which we recommended the fee should not be paid.

921. What case was that?—It was the case of a boy, of the name of Coleman, at Hendon.

922. Was the payment of that inquest ultimately refused by the magistrates?—The committee recommended it should not be paid, and reported their opinion to the court; it formed part of the report of the committee of finance, and that was agreed to, *sub silentio*; at the next court day the chairman thought it an important point, and drew the attention of the court again to the fact of their having refused the payment for an inquest; the court made no order upon the point, but still confirmed the resolution of the committee, which recommended it should not be paid; at the third county-day, as we call it, a magistrate moved that that resolution should be rescinded, and that the payment should be allowed; it was objected to by several magistrates that this was an irregular mode of getting rid of the question, and I moved it should be referred back to the committee for reconsideration; it was referred back to the committee, and the committee ultimately recommended it should be paid, and I believe since it has been paid.

923. So that during this period, when the abuse was supposed to exist in consequence of an inducement offered of 7s. 6d., only one case occurred that was at all disputed by the magistrates?—Only one case; but the committee were of opinion a great many inquests had been held unnecessarily; that is, individual members of the committee so thought.

924. Was it not the duty of the committee in such cases to have investigated those cases, and have rejected the payment for those inquests?—A great number of inquests may have been held, in the opinion of the committee, unnecessarily, which they could not refuse the payment of.

925. *Chairman.*] Was not the attention of the committee first called to the subject by the newspapers?—Yes, it was; at least my attention was first drawn to it through that medium.

926. *Mr.*

926. *Mr. Williams.*] If the magistrates did not feel themselves justified in refusing payment for those inquests, why did they refuse in the case you referred to?—Because they considered it had been held improperly; it had been held unnecessarily.

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927. *Mr. Wakley.*] On what ground was it presumed to have been held unnecessarily?—I am not so well acquainted with the facts of the case as Mr. Williams, a magistrate, who lives in the neighbourhood.

928. Was it the case of a boy who had a prong thrust into his foot, and who died 10 days after from locked-jaw, arising from the wound?—Coleman died of *tetanus*, arising from a prong, which was not thrust into his foot; it was a child who was running about in a hay-field; there was a pitch-fork lying on the ground and he struck his foot against it, and it created a wound; he was attended for it by a surgeon in the neighbourhood; he recovered; it broke out again, 10 days after; *tetanus* ensued, and he died, and an inquest was held; that is my impression of the facts of the case.

929. *Mr. Mackinnon.*] That was thought to be unnecessary?—It was so considered by the magistrates; it has, however, since been paid.

930. *Mr. Williams.*] Who laid those facts before you?—In the first instance, Mr. Williams, a local magistrate.

931. Is he not also rector of Hendon?—He is a clergyman, and the facts were afterwards confirmed by Mr. Wakley, who afterwards attended the committee.

932. *Mr. Wakley.*] Did not Mr. Wakley state, before the committee, that the boy had run against the prong; that he died in 10 days after receiving the injury, of locked-jaw, and that there was a wound in his foot when he saw the body?—Yes, I have already said so.

933. You have stated that he got well?—Yes, I have.

934. Do you consider the coroner has a discretion in such cases, and may refuse to hold inquests on receiving notice when parties have died a violent death?—Not in cases of violent death; but in other cases he has a clear discretion, and Mr. Wakley has exercised that discretion in many cases; he stated to the committee that during the time he had held the office, he had refused to hold inquests in above 30 cases, where he had received information from the constables, and the committee considered the exercise of such discretion to be highly proper and commendable.

935. Did he state any case in which he had exercised a discretion, when there had been a violent death?—I am not aware; he stated it was from previous inquiry he made, and it was, in his opinion, unnecessary.

936. *Chairman.*] Is it the duty of the magistrates to inquire, subsequent to an inquest, whether it was duly held, and by which, do you mean necessarily held?—Yes.

937. In those cases, magistrates have the discretionary power of refusing paying the fees?—Yes.

938. *Mr. Wakley.*] What Act gives the magistrates power of determining whether an inquest is necessarily or unnecessarily held?—A decision of the Court of Queen's Bench.

939. Under what Act of Parliament?—No Act of Parliament, precisely; but it is in this way: the Act of the 25th of George the Second vests the payment of the coroner in the court of quarter sessions; they may refuse payment or not refuse payment; the Queen's Bench decided that in the case of the King against the Justices of Kent; in the 11th East's Reports.

940. Are you acquainted with the merits of that case?—Yes, I am.

941. Will you describe the particulars of the case?—A coroner was summoned to attend an inquest; while holding that inquest, he received information that a person had dropped down dead; he immediately proceeded to the place where the body lay, impaneled a jury, and held a second inquest; he sent in his charge for both inquests; the magistrates refused it; he then moved for a *mandamus*, compelling them to pay it, on the ground that they had no discretion whatever, and that, as the inquest had been held, they were compelled to pay it. It was argued, and Lord Ellenborough then stated, that the magistrates were the judges whether the inquest had been "duly" held or not; whether the inquest "was duly taken;" it is clear, the proper interpretation of the word "duly" in that case was "necessary"; had it been unduly held, the inquisition would have been quashed.

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942. Are not the magistrates bound to pay the coroner for every inquisition which is duly taken?—For every inquest which is, in their opinion, duly taken.

943. Is it not an inquisition until it is quashed?—Yes.

944. Then how can you refuse payment until the inquisition is quashed?—You have just proved the point which I stated to the Committee before; my notion of the word “duly” in that case is “necessarily” held; had it been unduly held, in your sense of the term “unduly,” the only course which the Court of Queen’s Bench could have taken would have been to have quashed the inquisition, and to have declared it was no inquisition; but they said it was an inquisition, but it was unnecessarily held; therefore the justices have exercised a sound discretion in refusing to pay, and the rule was discharged.

945. Are you positive in stating that the question was raised in the court that the inquest was unnecessarily taken?—That is my reading of the case.

946. Have you read the word “unnecessarily” in the report?—Certainly not; the word in the report is “duly held,” and my sole reason for interpreting the word “duly” as “necessary” is, that the necessary consequence does not follow, which must have followed had the word “duly” been understood in the other way.

947. Could any man acquainted with the practice of the coroner’s court, or with what the law required in such cases, consider that an inquest was duly taken when the coroner went at once to hold an inquest on a person who had died suddenly, without summoning a jury in the usual form, or taking those steps which would necessarily make the inquest legal?—That was the old practice.

948. I am putting the question now with regard to the present practice?—The practice of the present day is, that the jury shall be summoned from the neighbourhood; and therefore I do not see any thing which took place there which would justify that inquest being treated as one that was “unduly held.”

949. *Chairman.*] Then you are decidedly of opinion that the term “unduly” cannot apply to the mere informality in the mode of holding the proceeding?—Clearly not, both from the nature of the case and from the course the Court of Queen’s Bench adopted.

950. If it had been confined to the mere informality of the proceeding, there would have been very little discretionary power vested in the magistrates?—None at all; they would be mere auditors in that case, having no discretion whatever.

951. That interpretation would render the law, and the decision upon it, nugatory?—Yes, quite so; the proceedings in the Court of Queen’s Bench, if the objection had been, the inquisition had been “unduly taken,” would have been different altogether; it would have been a motion to quash the inquisition; it came before the Court, on an application from the coroner, by way of *mandamus*; he applied for a *mandamus*, calling on the magistrates to show cause why they refused his fee.

952. Is the process this; there is a discretionary power vested in the magistrates as to the inquest having been held necessarily or unnecessarily; in the event of that discretionary power having been exercised in a manner unsatisfactory to the coroner, the coroner has the power of applying for a *mandamus* to the Court of Queen’s Bench?—Precisely so.

953. And until such *mandamus* is issued by the Court of Queen’s Bench, and until the inquisition is quashed, that discretionary power of the magistrates remains uninterrupted?—That is my view of the case.

954. *Mr. Wakley.*] Do you find any case in the books, with the exception of the one you have mentioned, in which that question has been raised?—No; it appears to me so clear as hardly to have required any decision.

955. Do you believe that that decision is universally acted upon by the magistrates throughout England?—I do; it has never been overruled.

956. Do you know of an instance in which the magistrates, since that decision was adopted, in any county of England, have disallowed an inquest?—It is impossible for me to say.

957. Are you acquainted with any case?—I am not; it is not possible I should; these are matters which are only known to the financial committees of magistrates of the respective counties.

958. Are

958. Are you aware of the magistrates, in any instance in Middlesex, having disallowed the coroner's fees, even when the inquisition had been quashed?—I am not aware of any such case.

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959. *Chairman.*] In regard to the particular case of Coleman, did it not undergo repeated investigations of the finance committee, and of the general court of magistrates?—It did.

960. And did not the Rev. Mr. Williams, who, it has been stated to-day and on former occasions, was the individual with whom the objection to the fees in that case originated, move subsequently that the resolution disallowing the payment of those fees should be rescinded?—He seconded a motion to that effect; stating as his ground for so doing, not that his opinion was changed, but that there appeared to be a wish on the part of the bench to put an end to the discussion, which had occupied a very considerable portion of the attention of the court for a long time; as it was a small sum, and, for the sake of peace and quietness (I believe those were the terms he used), he would second the motion.

961. Still there was an impression on the part of the magistrates it was a case of some peculiarity and importance, and that it required much consideration?—Certainly.

962. That consideration extended over several months?—Not over several months; it was considered settled for a long time; then it was revived.

963. *Mr. Wakley.*] Did it not extend from October to April?—I am not certain of the dates; it was reported on by the committee; that report had to come before the court, which took some time; it was agreed to; it came before a second court and was agreed to; it was at the third court (after it had been considered quite at an end) the matter was again revived.

964. *Chairman.*] Do you consider that any unfair exercise of discretionary power of the magistrates in any instance would ultimately be sanctioned by the general court?—It is the desire of the court, in my opinion, to give every possible latitude to the coroner in the exercise of very important duties consistent with their duty as guardians of the county purse.

965. Do you feel satisfied that there has not been any disposition on the part of the magistrates of Middlesex, as a body, to interfere unnecessarily with the powers vested by law in the coroner?—Most decidedly not.

966. They naturally regard the coroner as a judicial officer whose duties are of the greatest possible importance?—Yes, and of the greatest possible public utility if properly exercised.

967. *Mr. Wakley.*] Supposing the court, in the case of the King and the Justices of Kent, to have determined that the magistrates had the power to determine whether inquests had been necessarily or unnecessarily taken, have you at all considered how the Act of 1 Victoria, c. 68, bears on that decision?—I have not read that Act very carefully with a view of ascertaining that point; my general impression of the Act was, that it did not interfere with the discretion of the magistrates.

968. Are you aware that by that Act the coroner is compelled to make all the payments to witnesses, including medical witnesses, constables and other persons, according to the schedule which is prepared by the magistrates, and that he is guilty of a misdemeanor if he refuse to make such payments?—Yes.

969. Having made the whole of those payments, and exercised his discretion in holding an inquest, do you consider that the authority of the magistrates rides over his discretion, and can then withhold from him all those payments which he is compelled by law to make?—O yes, certainly; it is an office of profit, and he takes his chance of having made a payment in his own wrong.

970. *Chairman.*] Then you do not think there is any thing contained in this Act, 1 Victoria, c. 68, which repeals the former Act 25 Geo. II. on that particular point or reverses the decision of the former case?—No, I do not; nor do I think there is any thing inconsistent in the Act with the decision of the Court of Queen's Bench.

971. *Mr. Wakley.*] Who has the conduct and regulation of the prisoners in the gaols of the county?—There is a committee of visiting justices; 15 visiting justices of the house of correction and a similar number of the others; the management and regulation of the prisons is under their control.

972. Who has the superintendence and control of the County Lunatic Asylum?—A committee of 15 justices, appointed under the Act of Parliament for regulating county asylums.

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973. In whom is vested the preservation of the peace in the county?—It is vested in various persons, the magistrates and the sheriffs.

974. To whom are the poor to apply for relief in cases of difficulty and distress?—In the first instance to the parish officers.

975. And in cases of urgent necessity?—To the parish officers first; failing there, when there is not a board of guardians, to the magistrates.

976. If human life be lost in consequence of irregularity in the proceedings of any of the controlling authorities whom you have named, are the coroners and juries then brought into requisition to inquire into the causes of death?—Yes, they are.

977. Do you consider that it is a sound state of things that those persons who might have been found to have misconducted themselves, should be the auditors of the accounts of that very public officer who was the instrument and means of exposing their delinquency, and that they should determine whether he had necessarily or unnecessarily engaged in such an inquiry?—There is no practical objection, in my opinion, to it.

978. *Chairman.*] Are not the committees of magistrates appointed to superintend the prisons and lunatic asylums distinct committees from the finance committees who audit the accounts of the coroners?—The visiting magistrates of the lunatic asylum and the committee of the visiting justices are distinct committees; the finance committee in Middlesex is an open committee to any magistrate.

979. Then, although the magistrates belonging to those committees for the prisons and lunatic asylums may be some of them on the finance committee, yet, in fact, other magistrates are upon the finance committee, and consequently the whole proceedings must undergo the revision of a different body of men from those which superintend the prisons or gaols?—Certainly; and, in point of fact, the magistrates who are on the lunatic asylum committee and prisons committee very seldom do attend the finance committee; the duties of both those committees are very laborious, and the duties of the finance committee are generally discharged by magistrates who are not on those committees.

980. Does not the report of the finance committee come always under the supervision of the general court of magistrates?—There is a regular estimate sent to every magistrate of the account which will be recommended for payment on the county-day.

981. *Mr. Wakley.*] Are you not mistaken in supposing that those committees consist of different persons, for, in point of fact, is not the finance committee an open committee, consisting of the whole of the magistrates of the county?—I have already stated that; but, in point of fact, it is very seldom attended by those magistrates, whose time is very much occupied on these other important committees.

982. You have stated you have thought it was quite immaterial whether the magistrates having to exercise such functions as I have named, should determine whether an inquest was necessarily or unnecessarily taken?—I state, practically speaking, I think it is unobjectionable; I mean that there is no valid objection to it.

983. Did not the contest which has taken place in this county between the magistrates and the coroner, arise in consequence of an offence which was given to one of the magistrates in holding an inquest on the body of a poor man in the workhouse at Hendon?—I should say most decidedly and distinctly not, as far as I am concerned myself: perhaps the Committee would permit me to state under what circumstances I brought the subject of the coroners' accounts before the quarter sessions; my attention had been drawn, as I have already stated, to the subject by the press; I made some inquiries from Mr. Wright, the clerk, for the purpose of getting the number of inquests held, previous to coming down on the county-day; on the county-day I met Mr. Williams, and I said, "I am going to object to the payment of the coroners' accounts;" he said, "So am I; I have come down for the express purpose." Mr. Williams's objection arose out of a particular case which took place at Hendon; my objection arose to the increase of inquests which appeared to have taken place previously to Mr. Wakley's appointment as coroner; Mr. Wakley was not appointed until 1839; my observations related entirely to the year 1838.

984. *Chairman.*] And to which your attention had been directed by the newspapers?—Yes.

985. *Mr.*



985. *Mr. Wakley.*] I have a copy of the report of the discussion which took place at the Sessions House on October the 12th, now in my hand, and in that report it is distinctly stated that Mr. Williams brought his complaint before the court, antecedent to any remarks which were made by you or to the making of your motion?—That is precisely so; Mr. Williams will tell you, should he be examined before the Committee, that I met him in the vestibule and mentioned this to him; that he told me he was about to make a statement; I wished to make my statement first, as it was perfectly distinct from his; and mine was a complaint of the system generally, and his was a particular case; but he refused to give way.

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986. Then it was Mr. Williams who first brought the subject before the magistrates?—Yes.

987. Was it not Mr. Williams who raised the question, whether the magistrates had power to determine whether inquests were necessarily or unnecessarily taken; and did not Mr. Williams bring forward a case relative to an inquest which was held on the body of a man, named Thomas Austin, at Hendon, who had been scalded to death in a copper of boiling water, in the union workhouse of that parish?—Yes, he did.

988. Did Mr. Williams move, in the committee, that the fees on that inquest, and the expenses, should be disallowed?—I really do not know, but I think it is probable that he did.

989. *Chairman.*] The judgment of successive committees of magistrates who decided on the Hendon case, was entirely on public grounds?—Entirely.

990. *Mr. Wakley.*] How can you tell?—I can state my own opinion was entirely founded on public grounds.

991. *Chairman.*] According to the best of your judgment, the others were also?—According to the best of my judgment, the committee acted entirely on public grounds.

992. You do not believe personal feeling had any weight in the decision or conduct of the committee?—Most certainly not.

993. *Mr. Williams.*] Was Mr. Williams, before that occurrence, in the habit of attending the finance committee?—I really do not know; I was not in the habit of attending myself, and therefore I cannot speak on that subject.

994. *Mr. Wakley.*] Did you ever see him at the finance committee previously?—I am not aware that I did.

995. *Mr. Williams.*] Has he been in the habit of attending finance committees subsequently?—I have met him frequently when the coroners' accounts have been under discussion; those are the times when I have attended most myself.

996. Has he attended equally assiduously when other accounts have been examined?—I really do not know, not having attended myself; my attention of late has been directed principally to those meetings at which the coroners' accounts have been taken into consideration.

997. Do you think his attention has been directed to the same object, from the circumstance of your meeting him so frequently on those occasions?—Most probably so; I know he takes very considerable interest in this question.

998. *Mr. G. Knight.*] Supposing, in his opinion, there were circumstances attending those inquests which were improper, do you or do you not consider that it would be his duty to attend at the quarter sessions, with a view to bring that specially before the notice of the magistrates?—Most certainly; I think it would have been a dereliction of his duty had he omitted to do so.

999. *Mr. Williams.*] But notwithstanding the great assiduity displayed by yourself and Mr. Williams with regard to these coroners' accounts in particular, you have not discovered any instance where you have been able to satisfy the magistrates that the expense of the inquest ought not to be allowed?—No; there is a great unwillingness in the minds of the magistrates, and a great unwillingness on my own part, to throw any obstacles in the way of a sound exercise of the duties of the coroner, which we consider to be of great importance to the public.

1000. *Mr. G. Knight.*] And, therefore, you would not wish them to disallow such expense, except in very strong cases?—Certainly not, unless there was a very strong case indeed.

1001. *Mr. Williams.*] Have you and Mr. Williams been particularly deputed by the magistrates to inquire more particularly into the coroners' accounts than other accounts?—Most certainly not; I have no acquaintance whatever with Mr.

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Williams, beyond that of meeting him now and then at the quarter sessions ; I do not know where he lives ; I know nothing about him ; I met him quite by chance, as I have already stated, and he has taken considerable interest in this ; but it is a question that has excited very considerable interest in the magistrates generally ; it is not confined to Mr. Williams or myself.

1002. Are there any peculiar circumstances connected with the coroners' accounts that call for your attention, as well as Mr. Williams's, beyond any of the other accounts the magistrates have to inquire into?—Yes ; there was so very great and so rapid an increase, that it struck my attention more forcibly than other accounts which have not increased in that ratio.

1003. *Mr. Wakley.*] Did you consider it would have the effect of decreasing the expense, the election of a third coroner for the county?—In my mind, that question was not a question of expense, it was a question of expediency ; it was a question of the proper discharge of the functions of the coroner's office.

1004. When you talk of the increase of expense, are you bearing in mind that those expenses were mainly paid out of the poor-rate until 1837, and that since that time they have been paid out of the county-rate?—Oh, certainly ; I am speaking of the increased number of inquests.

1005. Will you undertake to say the expense is greater to the county, now that it is paid out of the county rate, than it was when paid out of the poor-rate?—I cannot say ; I can only speak of it while it has been paid out of the county-rate.

1006. *Mr. G. Knight.*] Do you consider that the coroner has a right to exercise his office by deputy or not?—Certainly not in counties ; he has certainly no right to appoint a deputy in counties ; under the Municipal Corporation Act the coroner for boroughs has the power of appointing deputies ; but no county coroner, as the law at present stands, has the power ; in fact, it was decided to the contrary in the *King v. Farrant*, on the ground of public policy, that he was a judicial officer, that no judicial officer could depute his functions to any other person.

1007. Not even in cases of illness or infirmity?—No ; the Chancellor has the power of appointing other persons immediately, on the representation of the magistrates.

1008. Explain that to the Committee further?—In case of any inconvenience arising from the illness of the coroner, or from his inability to discharge his duty, it is the duty of the Lord Chancellor to appoint another person.

1009. You say it is the duty of the magistrates to inform the Chancellor of what has occurred?—It is their duty to inform the Chancellor there is a necessity for another coroner, and it is for the Lord Chancellor to issue his warrant for the appointment of another coroner.

1010. Are you aware that it was the practice of Mr. Stirling to act by deputy?—I was not aware of it ; I never heard that it was so until it was so stated by one of the magistrates ; and the present chairman of the finance committee, Mr. Benjamin Hall, who has audited the accounts for many years, stated distinctly he was never aware of it, and had he been aware of it, never would have sanctioned the payment in respect of any inquest which had been held by Mr. Stirling's deputy.

1011. *Mr. Wakley.*] Had you not seen the reports in the public newspapers for many years that Mr. Bell had acted as deputy?—Never in any one single case.

1012. How could the magistrates be ignorant of the practice, when it was the constant system pursued for years, as we have it proved in evidence, that at the house of correction, under the very noses of the magistrates, the coroner for the eastern division took eight cases out of ten by deputy?—I was not aware that such was the case.

1013. *Mr. G. Knight.*] You think it illegal, if it were so?—Clearly illegal.

1014. Whether it was the practice or not, you believe it was clearly illegal?—It was clearly illegal, in my judgment.

1015. *Chairman.*] It appears by the evidence before the Committee, that Mr. Higgs was allowed by the magistrates to hold inquests by deputy, inasmuch as he had letters-patent empowering him to do so ; of what nature was the authority given by those letters-patent?—He is the coroner for the Duchy of Lancaster, and he holds letters-patent from the Crown, empowering him to be coroner for that franchise, and it empowers him “to hold inquests by himself or his sufficient deputy.”

1016. It is stated in evidence that the word “deputy” is omitted in those letters-patent, so far as relates to the return of inquisitions?—It is so, as to the return of fees ;

fees; he is required to make up his accounts, and to send them in at certain times; but the words "his deputy" are omitted; but in the former part of the letters-patent there is a clear and distinct power given to him to hold inquests by deputy.

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1017. What led the attention of the magistrates, particularly, to the fact of the coroner holding inquests by deputy?—It came to the knowledge of some of the magistrates that some inquests which had been returned as having been held by Mr. Wakley had been held by his deputy, Mr. Bell, the clerk; that drew the attention of the magistrates to it, and inquiries were also made of Mr. Higgs and of Mr. Baker.

1018. Was it ascertained Mr. Baker did not hold inquests by deputy?—Mr. Baker assured the committee, in no case had he held an inquest by deputy.

1019. It appeared Mr. Wakley had held inquests by deputy?—Yes, I think 11.

1020. And the fees on such inquests were disallowed?—Yes.

1021. And that was entirely on the ground of the interpretation of the law on that subject?—It was on the ground that they were illegal, and that consequently they were not inquisitions.

1022. *Mr. Williams.*] Was it the practice of Mr. Stirling, Mr. Wakley's predecessor, to have inquests held by deputy?—It has been so stated; I was not at all aware of it; a very large number of the magistrates have also stated, that they were not aware of it at all; in fact, but one magistrate has stated that he was aware of such a fact.

1023. Did you direct the same particular attention to the coroners' bills in Mr. Stirling's time that you have done recently in Mr. Wakley's time?—No, I did not; my attention was not drawn to the coroners' accounts before October 1839, or the latter end of September.

1024. You have stated that the particular reason that induced you to apply your attention to those particular accounts arose from the great increase in inquests?—Yes.

1025. It appears, by this printed return, that the number of inquests in the year 1838 was considerably more than they were in 1839, making due allowance for the remaining part of the year, from the 14th September to the end of it; it appears that portion of 1839 was considerably less than 1838; how do you explain that?—It appears so by that return; but I wish to state to the Committee the observations I made to the court had reference solely to the increase which took place in the year 1838; my wish was to draw the attention of the court to the fact, that the number of inquests had increased contemporaneously with the increased allowance to the parochial officers.

1026. *Mr. Wakley.*] Can you reconcile the statement, that your observations had reference to what passed in 1838, when you moved, on the occasion that you brought the subject before the court, to refer the coroners' accounts back to the committee for the want of vouchers, and also moved for a committee to inquire into the cause of the increase of inquests?—The one is a clear deduction from the other; the appointment of the committee to inquire into the increase of the number of inquests is a necessary consequence of a complaint of the increase of inquests; I also objected, certainly, to the inquests which had been taken subsequently to 1838, and the only way to bring that under the consideration of the committee was to refer it back to them.

1027. But in the year 1839, from the time that Mr. Wakley was elected to his office to the period when you made the motion in October, had there not, in point of fact, been a decrease of inquests, as compared with those that had been taken in the preceding year?—It appears that there was.

1028. *Mr. Williams.*] In the course of the examination of Mr. Wright, he put in a statement of 107 inquests held by Mr. Wakley from the 14th October 1839 to the 7th of December 1839, which came to 95*l.* 0*s.* 6*d.*, and the expense of 117 inquests held by Mr. Baker during the same period, came to 181*l.* 9*s.*; the committee seeing so extraordinary a difference, were desirous of ascertaining how it arose; and Mr. Wright has put in a statement this morning, in which all the items are explained; it appears the material difference arises between the charges for medical witnesses; in Mr. Wakley's charge for these 107 inquests, it is 16*l.* 16*s.*; in Mr. Baker's 117 inquests, it is 87*l.*; now there being such a difference, has that circumstance never struck the magistrates as being extraordinary?—It has struck me, certainly; and I am of opinion that Mr. Baker does not use a proper discretion in the summoning medical witnesses; I think he is too ready

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to summon medical witnesses, and to have *post-mortem* examinations; at the same time it must be taken into consideration that Mr. Baker's district comprises a very densely populated neighbourhood; it is also in the immediate neighbourhood of several hospitals, and that medical evidence is more necessary there in a greater number of cases than it is in country districts, when all the circumstances attending the death of the party on whom the inquest is held, are matter of public notoriety.

1029. But the medical inquiry does not go to ascertain how the death has occurred, but into the cause of the death?—The Act of Parliament allows the coroner and the coroner's jury to send for a medical man when the person has been attended by a medical man; to send for the medical attendant, in point of fact; in London there is a greater facility for procuring medical attendance than there is in the country.

1030. Do you not consider that the sending for a medical attendant to account for the death is improper, inasmuch as the want of proper medical attendance might have been the cause of that death?—I certainly think so; I think Mr. Baker has not exercised a proper discretion in allowing so large a sum for medical attendance; I think that in very many cases medical witnesses have been summoned by Mr. Baker, when there was no necessity whatever for their evidence.

1031. Have the magistrates made any complaint to Mr. Baker on that score?—Yes, they have; perhaps the Committee will permit me to refer to a small portion of the report, which shows that the attention of the committee was drawn to the circumstance; that the economy which had been exercised by Mr. Wakley was praised, and the want of economy of Mr. Baker was reflected upon; it says this, "The committee feel bound to state that they can discover no cause for so large an excess as one-third in the expense allowed by Mr. Baker beyond that allowed by Mr. Wakley; and to express their opinion, a considerable reduction may be made for the future by that gentleman (that is Mr. Baker), without detriment to the due exercise of his office, and with advantage to the rate-payers."

1032. You have stated many of Mr. Baker's inquests are held in hospitals?—Yes.

1033. Is there any charge made for medical attendance at hospitals?—That is a point of practice which I am not able to answer.

1034. Is it not an understood fact, that the surgeons of hospitals do give their evidence on those occasions without any fee?—I presume that is so.

1035. And therefore the circumstance of so many more inquests taking place in hospitals in Mr. Baker's district than in Mr. Wakley's is another additional proof of the very great increase of charge which occurs in that department in Mr. Baker's district?—Yes; that ought rather to have the effect of reducing his expenses, certainly. Permit me to state, that I think very great economy has been exercised by Mr. Wakley in the allowance to witnesses, and very proper economy.

1036. *Chairman.*] Do you not think that medical knowledge in a coroner may perhaps enable him to determine much more easily whether medical witnesses ought to be called in or not?—Of course it is desirable that every presiding officer should have as much information as possible; I am of opinion that a coroner's inquest ought to be confined as strictly as possible to being a judicial inquiry, and not a medical investigation. I think it is of much more importance we should have a legal officer to preside over a judicial inquiry than a medical one; it is always in the power of a legal officer to call for medical assistance; and as in many cases the coroner's inquest has the effect of putting people on their trial for their lives, it is of great importance that that inquiry should be conducted with as great a regard to legal precision as possible; and I think, upon the whole, that it is preferable to have a legal officer than a medical officer, *cæteris paribus*.

1037. My question did not go into the general question in any point, but merely referred to a particular point, of the advantage a coroner would derive from medical knowledge?—Certainly; but a legal officer can very easily obtain sufficient medical information to lead the inquiry to its proper result.

1038. *Mr. Wakley.*] Do you not think it of importance, the officer who presides in the court should understand the testimony when he hears it?—Of course.

1039. If he has not medical knowledge, how can he understand medical testimony?—The same objection will apply to the jury; if it is necessary to have a medical judge, you must have a medical jury.

1040. That

1040. That objection may also apply to the jury; but is not the evil greatly aggravated if the whole court, consisting of judge and jury, are ignorant on the points of evidence, as regards medical testimony?—Clearly; no doubt about that.

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1041. *Mr. Williams.*] The object of a coroner's inquest being exclusively for the purpose of ascertaining the cause of death, is not a medical man the fittest person to form a correct judgment?—No; I apprehend that is not the object of a coroner's inquest; the object of a coroner's inquest is to inquire whether the deceased came to his death by fair or by unfair means.

1042. That is the cause of death?—That is a judicial inquiry.

1043. That is the cause of his death—fair or unfair means; that is the cause of death they inquire into?—That is not a medical investigation.

1044. *Mr. Wakley.*] Are not the jury sworn to ascertain by what means the party came to his death?—Certainly.

1045. And does not that inquiry very often involve medical treatment?—No doubt.

1046. *Mr. Williams.*] Does it often involve a question of law; the cause of death?—Yes, the reception or rejection of evidence.

1047. But does the cause of death, I inquire, involve a question of law?—Yes, evidence as to cause of death.

1048. But does the cause of death itself?—Yes, I apprehend it does.

1049. *Chairman.*] The law recognizes the coroner as a judicial officer?—Clearly; the coroner is in the place of the sheriff, when the sheriff is an interested party; it only happened very lately, the coroner of the western division presided over two special juries.

1050. Is it not of consequence he should have a knowledge of the mode of taking evidence and of the rules of evidence?—It is essential, in my opinion, that the coroner should be conversant with the rules of evidence and the mode of conducting a judicial inquiry.

1051. *Mr. Williams.*] Is there any difficulty in an intelligent medical practitioner acquiring a sufficient knowledge of those rules to enable him to hold an inquest legally?—The difficulty will be in exact proportion to his talent; if he is a clever man, he may acquire that with great facility; if he is not, it cannot be looked for.

1052. Do you not consider it would be a great advantage in discharge of duties connected with the coroner's office, if you could find a coroner who combined in his own person legal and medical knowledge?—It is very desirable; any body who has to conduct an investigation either of a legal or medical character, or where they are combined, should be a person possessing as much talent as possible; we have now a distinct branch of legal education, medical jurisprudence.

1053. *Mr. Wakley.*] I wish to return for one moment to the question of the constables; you say you consider that they are now paid for the performance of their duties, and adequately paid out of the poor-rate?—Yes, I think so; I presume so from their holding their situations.

1054. Do you consider that sufficient payment extends to the duties which they perform at coroners' inquests?—I conclude that they consider the salary which they receive to be a sufficient remuneration for the whole of their time which they devote to the parish.

1055. Do you consider that they are or that they are not paid for the duties which they perform at coroners' inquests?—I think the salary ought to include the duties which they perform at coroners' inquests.

1056. Have you attended to the preamble of the Act of Victoria, cap. 68?—I know the effect of it; I do not recollect the words.

1057. Would you be kind enough to read the words?—"Whereas the holding of coroners' inquests on dead bodies is attended with divers necessary expenses; for the payment whereof no certain provision is made by law, and such expenses have been usually charged without any lawful authority for that purpose out of the monies levied for the relief of the poor, and it is expedient to make adequate legal provision for the payment of such expenses; be it enacted," and so forth.

1058. Is not that clearly providing that the expense shall be paid out of the county-rate?—Certainly; I do not dispute that.

1059. That Act directs that the magistrates shall meet in session, and prepare a schedule of the fees which shall be paid out of the county-rates connected with the holding of the inquests?—It does; that is the object of the Act.

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1060. The Act having provided that the expenses shall be paid in that way, are the constables now paid according to the provisions of that Act?—This is the general Act for the whole of England, and the general practice is, that constables are not paid; it is a duty cast on the inhabitants of each parish to discharge his duty of watch and ward; in the metropolitan district, that duty is so onerous, that it would be found quite impossible to carry the duty on at all by means of the inhabitants in the metropolitan parishes, therefore they have had certain salaried officers appointed under the local Acts of Parliament, with power to the vestries, or to the parochial governing body, to pay those officers such a salary as they think a sufficient remuneration; and it is only with reference to such officers that the resolution of the committee of magistrates has any reference.

1061. They are paid?—Yes.

1062. If they are paid out of the poor-rate, is that illegal?—It is.

1063. Does the Act of Victoria expressly provide that they shall be paid out of the county-rate?—It does.

1064. Has not the schedule which you have issued prevented the coroners from continuing those payments?—Not to constables generally, but only to that particular class of constables who receive, in the opinion of the committee who made that schedule, a sufficient remuneration for the whole of their time; we consider that if officers, receiving regular salaries, are also to receive these fees, the parishioners would be paying twice over for the duties to which they have a right.

1065. But, inasmuch as the Act of Victoria has declared that they shall be paid out of the county-rate, and that it is illegal to pay them out of the poor-rate, is not any other payment than from the county-rate illegal?—Certainly; and I do not propose to pay them out of the poor-rate; I do not propose to pay them at all; I do not propose to increase the remuneration they already receive for the whole of their time.

1066. *Chairman.*] The allowance to jurors has been discontinued in the county of Middlesex?—There never was any allowance to jurors, I believe; but, at all events, if there was, there never was any legal allowance.

1067. It has been stated, over and over again, in the evidence taken before the Committee, that there was such an allowance; and it appears from the returns of the coroners, laid before the Committee, that such a practice exists in a great many counties of England?—I can only speak of the county of Middlesex, and I was not aware that it was the practice to make any allowance to jurors; with regard to constables, though there is not a regular mode of remuneration, there is a piece of patronage which they have, which, I dare say, is not an unprofitable one; it is the practice of the constable to fix the public-house at which the inquest is to be held; it must be quite evident, when it is an inquest exciting public interest, that that will be a very productive thing to that public-house; and, at all events, there is some outlay, and that, I know, is considered to be a source of profit to the summoning officer.

1068. *Mr. Wakley.*] Do you believe there would be any great objection, on the part of the magistrates, to return to the first schedule of fees which they adopted?—I should resist any return to the system of allowing a fee to a parochial officer who already receives a fixed salary.

1069. You would object to carry out the principle of the Act of Victoria?—I do not admit it at all interferes with the principle of the other Act.

1070. Does not this Act expressly provide that the payment of the expense for holding inquests shall be made out of the county-rate?—Yes, but it is matter of public notoriety that that was for the purpose of remunerating officers and parties who had no other source of remuneration.

1071. Are you aware that many of the beadles were in the receipt of distinct payments from the parishes before the Poor Law Commissioners issued their circular?—I have heard that they were, but I am not aware of it.

1072. Do you consider it is just that the payments should be taken away, and that nothing should be allowed in their stead?—Yes, in cases where the payment has been from the first an irregular payment; there is no doubt, individually, it is a case of hardship, but, in point of general principle, we have to look to the rate-payers.

1073. Then the Committee are to understand, although it is expressly provided by the Act of Victoria, that the expense should be discharged out of the county-rate, that you would still require that the constable should be paid from another source?—

source?—The constable who has already a permanent salary, a fixed amount of salary. *Peter Laurie, Esq.*

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1074. Suppose his salary amounts to only a guinea week, or to only 10s. a week, although the salary may be sufficient for the discharge of his other duties, yet would be altogether insufficient when extended to coroners' inquests; would you still withhold from him any payment, notwithstanding the provision of the Act of Victoria?—Every man has the best estimate of the value of his own time; these beadles have agreed to give up their time, the whole of their time, the whole of their services, from morning to night, for a fixed salary, to the parish; surely it is but justice that the parish should have the opportunity of employing that time which they have purchased.

1075. But you have provided, that if there be a salaried officer in the parish that the constable receiving no salary shall not be paid?—Yes.

1076. Do you believe that to be in conformity with the provisions of the Act of Victoria?—Yes, I do; I do not think that it is inconsistent at all with the Act; that, as I have already stated, was for the purpose of preventing collusion between the officers receiving a fixed salary and other constables receiving none, for the purpose of preventing the first order of the magistrates being evaded.

1077. Suppose the beadle is not a constable?—In that case the provision does not apply.

1078. In that case the coroner, you believe, could legally pay unsalaried constables?—There is no salaried constable then.

1079. But an unsalaried constable?—There is no salaried officer in that case; if the salaried officer be not a constable, the regulation does not apply.

1080. Then it is to be regretted the magistrates have not been more clear in the manner in which they have printed their regulations, because the words are these: "That the allowances are not to be made to domestic servants nor to constables in the metropolitan police force, nor to parochial constables or *officers* receiving regular salaries or wages;" then the beadle being a salaried officer in the receipt of regular wages, how can the coroner, under this provision, legally pay the unsalaried constable in such a parish?—He cannot direct his warrant to a parochial officer not being a constable; he must send it either to the headborough or constable; a beadle not being a constable would not be competent to execute the warrant.

1081. Are you aware that there is one parish (St. Andrew's, for example), a salaried constable sworn in to keep the peace in the workhouse, and the workhouse alone?—That cannot be.

1082. It is under the Police Act; and that constable or beadle refused to serve the coroner's warrant, because he was not paid?—There is a dilemma in that, in this respect; you say that he is a constable only for the workhouse; if that is so, he could not execute the warrant out of the workhouse, because he is no constable out of it.

1083. Then the Committee are to understand that, in your opinion, the payments may be legally made to constables when the beadles are in receipt of salaries, they not being constables?—Oh, clearly they must; the regulation cannot apply to such a case.

1084. *Chairman.*] The warrant of the coroner is issued to the beadle as constable?—Yes; he would have no power as beadle to execute the warrant.

1085. Then, when you stated the coroner's warrant was never sent to a beadle, you meant to say it was not sent to the beadle as beadle?—Yes, it was always sent to the beadle as constable.

1086. But, in fact, that warrant is sent to the beadle, and the beadle summonses the jury and attends the inquests?—Yes, that is the practice.

1087. But his office of beadle is completely merged during the whole of that process?—Yes, in the office of constable.



*Martis, 30<sup>a</sup> die Junii, 1840.*

MEMBERS PRESENT :

Lord Eliot.  
Sir George Strickland.  
Colonel Wood.

Mr. Wakley.  
Mr. Gally Knight.  
Mr. Williams.

LORD TEIGNMOUTH IN THE CHAIR.

Mr. Thomas Bell again called in ; and Examined.

Mr. Thomas Bell.

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1088. Mr. *Wakley*.] FROM the time that you were clerk to Mr. Stirling in 1823 to the passing of the Act of Victoria in 1837, out of what fund were the expenses of holding inquests paid?—Out of the poor-rates by the several parishes, as far as regards the expenses of the inquest; the coroners' fees for taking inquests were paid as usual out of the county-rate.

1089. Can you enumerate the items of charge in those expenses?—Yes; at the parish of Ealing there was an allowance of 5*s.* to the constable, 12*s.* to the jury; at Islington the beadle had 4*s.*, the jury 8*s.*; at Hampstead the constable had 2*s.*, the jury 10*s.* Those were allowances made by the parishes from time immemorial.

1090. Mr. *G. Knight*.] In what years?—This was in 1837. I collected these points preparatory to the forming of the schedule under the Act of Victoria. At Kensington there was allowed for the use of a room 10*s.*, that money being generally spent in refreshments for the jury; at Fulham the constable had 10*s.* 6*d.*, the jury 8*s.*; at Hammersmith the beadle had 7*s.* 8*d.*, the jury 4*s.*; at Staines the constable had 6*s.* 8*d.*, and the jury 13*s.* 4*d.*; at Uxbridge the constable had 8*s.*, and the jury 12*s.*; at Hillingdon the constable had 6*s.* 8*d.*, attending the court, 4*s.*, and the jury were allowed 15*s.*; at Harefield the constable had for his journey 15*s.*, for summoning the jury 7*s.*, and the jury were allowed 20*s.*

1091. Mr. *Wakley*.] The allowances of the different parishes varied?—Yes.

1092. But did the allowances, such as they were, give satisfaction to the parties who received them?—I should say universally; I never heard of any objection.

1093. Did you experience any difficulty in the court with respect to payment until the circular of the Poor Law Commissioners was issued in March 1837?—None at all.

1094. Did the constables sometimes gain by the allowances which were made to juries?—I have no doubt they did, and I have seen instances of it; I have seen them receive the money allowed to the jury.

1095. You have seen the allowances made to the jury handed over to the constable?—Yes; I am only speaking of a few instances; I was not always present.

1096. The payments you have now described as having been made by the parishes, were discontinued by the overseers in consequence of an order which was issued by the Poor Law Commissioners?—They were.

1097. Was any Act of Parliament passed to relieve coroners from the difficulties which they experienced in consequence of the withholding of those payments?—Yes, the 1 Vict., c. 68, entitled, "An Act to provide for the Payment of Expenses of holding Coroners' Inquests."

1098. When did that Act come into operation?—It received the royal assent the 15th of July 1837.

1099. Were the justices of the peace in all the counties of England directed in that Act to meet in quarter sessions and make a schedule of the fees and allowances which should be made on the holding of inquests in the several counties?—It is so enacted.

1100. Do you know when the justices of the peace for the county of Middlesex met for the purpose of preparing a schedule for that county?—It was either in the latter part of July or in the month of August; I cannot at this moment recollect which; in the year 1837.

1101. Was

1101. Was that immediately after the Act received the royal assent?—Yes; that passed in July, and I think this was in the month of August. Mr. Thomas Bell.

1102. Do you know whether the magistrates before preparing the schedule consulted with Mr. Stirling and the other coroners?—They did, with Mr. Baker, his coadjutor. 30 June 1840.

1103. And the coroner of the Duchy of Lancaster?—Yes, Mr. Higgs.

1104. And the coroner of Westminster?—Yes.

1105. Were they all consulted?—Yes.

1106. Were you also consulted by the justices on that occasion?—I was.

1107. Did you assist the justices in preparing the schedule?—I did, in committee.

1108. Can you state the considerations which governed your decision in proposing a payment to the constables and other parties?—The schedule was drawn up, chiefly taking the precedent of payments of the several parishes that had originally been made, and drawing as fair a line as we could, that they should be properly and sufficiently remunerated.

1109. Was any distinction made in that schedule between the constable who received no salary in the parishes, and the constable who happened to receive a salary as beadle of the parishes?—No.

1110. Did the constable or any parties complain of the allowances which were made to them in that schedule?—None; I never heard of any complaint.

1111. How long was that schedule acted upon?—I think up to October last; I am not quite certain; I know it was up to the autumn of last year.

1112. Were the payments made according to it until the death of Mr. Stirling?—Yes, they were.

1113. Has the schedule been altered since the last election of coroner for the county of Middlesex?—It has been altered, so far as regards the payment to the constable.

1114. How much was the constable allowed in the first schedule for summoning the jury, giving information to the coroner, hiring the room to hold the inquest in, and attending the inquest?—Seven shillings and sixpence for the first day; but if there should be an adjournment of the first day's meeting, he would be allowed 3s. 6d. only.

1115. Was that sum of 7s. 6d. allowed to every constable, whether he happened to be a salaried beadle or not?—It was.

1116. What is allowed to the constable, being a salaried beadle, now under the new schedule?—Nothing is allowed to him now.

1117. He has no payment whatever, neither for giving information, summoning the jury, or attending the inquest?—The payment is withdrawn by what is called an amended schedule, made by the magistrates in the autumn of last year.

1118. Since that alteration in the schedule has been made, have the payments been entirely withheld from the constables and beadles in the great parishes of St. Marylebone, St. Pancras, Islington, Clerkenwell, Paddington, St. Giles in the Fields, and St. George, Bloomsbury?—Entirely.

1119. Since that schedule has been altered, has a single constable been paid on any occasion in the parish of St. Marylebone?—Not one.

1120. I wish you to be particular in answering that question, because it has been stated before this Committee that the constables of that parish have been paid since the alteration has been made?—Within this week I have very carefully examined the books, and, from memory as well, I am quite confident that not one person has so acted or officiated, except the usual officer, that is the beadle or constable of the parish; and they have not, in any one instance, been paid from the time of the amendment of the schedule; that I can undertake to answer for.

1121-2. Do the parishes which have been enumerated contain the great bulk of the population in the western division of the county?—They do.

1123. Is any payment made to constables in the parish of St. Andrew, Holborn?—The payment was discontinued to the beadle of St. Andrew, Holborn, according to that amended schedule, and he declined, in consequence of the payment being withheld, performing the duty any longer, and upon his declining to act, the parish constable sworn in at the court-leet has taken the duty upon himself, and the number of instances in that parish only amount to three.

Mr. Thomas Bell.

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1124. Does he complain of the performance of the duty, although he is paid?—The person who has attended to the two last cases has made no complaint; but I understand the person who took the first case, Edward Frewin, made a complaint, and objected to continuing the duty.

1125. Do you believe, if a return were made to the payments under the first schedule, that the arrangement would be satisfactory to the constables?—I think perfectly so.

1126. Do you find that the withholding the payments from the constables has had any effect upon their conduct at inquests?—I fancy I observe a great alteration in their manners; they seem to perform it with reluctance, and apparently with great unwillingness; certainly not with the same willingness that they formerly did.

1127. *Chairman.*] Do you think that they have neglected their duty?—I cannot go so far as to say that; they certainly do not perform it with that spirit and attention which they formerly did.

1128. *Colonel Wood.*] Was any representation made to the magistrates to that effect?—No; the beadles themselves have made a remonstrance to the magistrates.

1129. Has any representation, on behalf of the coroners, been made to the magistrates of this inconvenience?—Oh, no; at least I only speak of the coroner of the western division.

1130. *Chairman.*] Has the regulation of the magistrates been in no case evaded in Mr. Wakley's district?—Not in any instance; I think I can explain that point: on the payment being withheld from the constable in the parish of St. Pancras, there were only two inquests held in which the parish constable did the duty, and was paid; the beadle, as before, undertook afterwards to do the duty without pay; there was no evasion; when the beadle was not paid, the parish constable applied for the warrant. There never was any one case of the kind in St. Marylebone. In St. Giles-in-the-Fields there were eight inquests, in which the parish constable made the application for the warrant, and received payment, instead of the beadle. In Paddington there was one case only.

1131. The constable receiving a salary?—Yes; the constable receiving a salary chose to do the duty without being paid; and of course the parish constable is not employed. In Chelsea, the beadles there declined to act without being paid; in consequence there have been 20 inquests taken, in which the parish constable has acted, and has been paid for his attendance. At Hornsey four. Those are all the cases which have happened from the 23d of December 1839 up to the present time, making altogether 38 cases.

1132. *Mr. Williams.*] In the payment of constables, do you adhere strictly to the terms of the schedule issued by the magistrates?—With the greatest care and strictness.

1133. And that enjoins that no fee shall be given to a salaried constable?—Yes.

1134. Are you aware whether the schedule, in the same respect, is strictly adhered to in the eastern district, which is Mr. Baker's?—I think it has not; I know it has not at all times been done.

1135. Have you heard any complaints by the constables or beadles in Mr. Wakley's district, that payments are made in the eastern district which are refused in Mr. Wakley's district to those persons?—I do not recollect any such complaint.

1136. *Colonel Wood.*] Now your practice is, if the beadle receives no salary, to pay him his fees just as before?—Yes.

1137. *Mr. Wakley.*] Is there such a thing as an unsalaried beadle in the metropolis?—Certainly not.

*Thomas Wakley, Esq., a Member of the Committee, Examined.*

*Thomas Wakley,*  
*Esq., M.P.*

1138. *Chairman.*] YOU are one of the coroners of Middlesex?—I am.

1139. How long have you held that situation?—Since the 25th February 1839.

1140. What are the boundaries of your district?—My district extends from Holborn through to the parish of St. Giles, along the north of Oxford-street; then it passes across to Kensington, includes Chelsea, and runs on by the Thames to below

below Staines, and then northward to within a mile of Rickmansworth, and from thence to Potter's Bar, bordering on Hertfordshire.

1141. Mr. *Williams*.] When you entered on the duties of your office, did you engage a gentleman who had been in the service of your predecessor?—I did; I engaged him as clerk; his name is Bell, and he has been examined before this Committee.

1142. How many years had he been in the service of your predecessor, Mr. Stirling?—Fifteen years.

1143. Did you give him instructions to act for you in all respects precisely as he had done while in the service of Mr. Stirling, in the issuing or withholding of warrants, and to make out the coroner's accounts precisely as he used to make out Mr. Stirling's accounts?—I did; those instructions were given to him most fully and positively.

1144. Shortly after you were elected to the office of coroner, I think you held an inquest at Hayes?—I did; that inquest was held on the body of a gentleman who had unfortunately been stabbed in the abdomen by a companion, and the jury returned a verdict of wilful murder.

1145. What was the condition in life of the party against whom the verdict of wilful murder was returned?—He was a gentleman.

1146. Had he been taken up, and was he at the time in the custody of the magistrates?—Yes; he was in the custody of the county magistrates at Uxbridge.

1147. Did the magistrates pursue any course in the case, subsequent to the coroner's jury returning a verdict of wilful murder?—The inquiry before the coroner lasted two days, and the jury consisted of the gentry of the neighbourhood, and there were on it a barrister, and one if not two solicitors; at the conclusion of the proceedings, when the verdict was returned, I having been in the office then only about three weeks, was anxious that no error should arise, and directed Mr. Bell to act precisely as he had done for Mr. Stirling in all the various cases which had come before him; Mr. Bell stated that it had been customary for the magistrates on all previous occasions on seeing such a warrant, immediately to commit the party to Newgate for trial; but in the case of which I am now speaking, the magistrates apparently paid no attention to the verdict of the jury; for they re-opened the case, and at the conclusion of their proceedings committed the prisoner to Newgate on the charge, not of murder, according to the verdict of the coroner's jury, but of manslaughter.

1148. When the magistrates committed the accused party for manslaughter, were they aware that the coroner's jury had previously returned a verdict of wilful murder against him?—It was stated so on the face of the warrant for his apprehension, which was addressed to them by the coroner after the jury had returned their verdict.

1149. What was the expense of holding the inquest by the coroner?—The expenses paid by the coroner and charged to the county were as follows: To the constable, for summoning the jury and the two days' attendance, 18s.; to T. Baylis, for the use of a room for holding the inquest, 15s.; to Benjamin Chadwick, surgeon, for making a *post-mortem* examination and attending at the inquest, 2l. 2s.; to Ralph Allen Frogley, surgeon, for attending at the inquest and giving evidence, 1l. 10s.; making a total of 6l. 7s.

1150. Can you state the amount of the expenses incurred before the magistrates which was charged to the county-rate?—It is in the return which I hold in my hand, and is as follows: "To Edward Bonney," a young gentleman who was a witness before the coroner's court, but who was not paid any thing there, "10l.; to Benjamin Chadwick, 2l. 2s.; to Charles Patten, surgeon, 3l. 3s.; to Ralph Allen Frogley, surgeon, 1l. 11s. 6d.; to David Cooper, 3l. 12s.; to Thomas Clark, 10s.; to Charles James Murray, constable, 32l. 16s. 6d.;" making a total of 53l. 15s.

1151. Did any other case occur shortly afterwards in which the authority of the magistrates interfered with the office of coroner?—Yes; in the same district, within a short period afterwards, a young man, the son of a small farmer, a seller of fish at Harefield, was stabbed in the abdomen by a boy named Coker, and died in consequence in a very short time; on holding the inquest in that case the prisoner was present; he had been taken into custody, and was brought before the inquest by the constable of Uxbridge; in that case, also, the jury returned a verdict of wilful murder, whereupon, adopting a somewhat different

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rent practice from the one I had pursued in the previous case, I immediately made out a warrant for the committal of the party to Newgate; the constable stated that he had been directed to bring back the prisoner to Uxbridge, but my reply to him was, that as the party was then in my custody, and as a jury had returned a verdict of wilful murder against him, I did not feel myself justified in taking any other course than that of sending him immediately to Newgate for trial; subsequently the magistrates met at Uxbridge to go on with the inquiry, as they had done in the one that occurred at Hayes, and the proceeding of the coroner in committing the party, notwithstanding the jury had returned a verdict of wilful murder, was severely censured; and the conduct of the constable, in not bringing back the prisoner, also subjected him to a strong rebuke.

1152. In that case, did the magistrates take any proceeding besides expressing those opinions upon the conduct of the coroner and of the constable?—Not that I recollect.

1153. By taking the latter course, of sending the prisoner direct for trial, you saved the county the expense to which it would have been subjected by a second inquiry taking place before the magistrates, similar to the one that occurred at Hayes?—Undoubtedly; by a reference to that account it would appear that in Coker's case the saving amounted to 53*l.* 15*s.*

1154. Did the registrar of deaths at Hendon make any communication to you respecting a death that had occurred in that parish?—He did, about the latter end of September last.

1155. What was the nature of that communication?—He stated that he had registered the death of an old man who had fallen into a copper of boiling water, and had died in consequence; that since he had made the registry he had been informed that it was a case for an inquest, and he begged to know from me if such were the fact; I directed the clerk to answer his letter, by stating, that without doubt, if he had not misrepresented the circumstances, it was a case for an inquest, and that if the man had died under the circumstances related, the coroner would be compelled to direct the disinterment of the body.

1156. Had the body been buried at the time?—No; the communication from the registrar was received by me, I believe, on a Saturday, and he was answered immediately; at that time I had received no communication from the regular summoning officer; but on the Saturday night, or on the Monday morning, the usual notice came from the constable; a warrant was issued for taking the inquest, and I attended at Hendon, I believe, at two o'clock on the following day. When I arrived at the workhouse, where the inquest was to be held, I found two of the justices who were *ex-officio* guardians of the union; and I then was very much surprised at hearing that the body of Thomas Austin, who had been scalded to death, had been buried on the previous afternoon; Mr. Holdgate, the surgeon of the parish, was in attendance, and the jury having been assembled, Mr. Holdgate was called as a witness, and he having stated on oath that Austin's death was caused by his having fallen into the boiling water, a warrant was made out and addressed to the rector and churchwardens, for the disinterment of the body, and the inquiry was adjourned till the following day. I again attended at the hour named, but found that the body had not been disinterred; and the constable informed me that the rector would pay no attention to the warrant, as he did not consider it was his duty to comply with its terms; stating, at the same time, that the rector, the Reverend Mr. Williams, would raise no obstacle to the disinterment of the body, but that he would not direct that duty to be performed. One of the churchwardens positively refused to comply with the terms of the warrant, and directed the sexton not to assist in the disinterment; new warrants were prepared, and the constable was directed to serve them personally on the rector and churchwardens, and the inquest was adjourned till the following Friday, at four o'clock; when I attended at that time, still there was no body produced; the warrants had not been obeyed; consequently, I was compelled to hire some labourers on the spot, and cause the body to be taken up for the view of the jury; I believe this took place on the 2d of October. Whilst at Hendon, on the first occasion to hold the inquest on Austin, the constable informed me of the death of a boy at the Hyde, near the village of Hendon, named Henry Coleman; it was stated that he had run a hay-prong into his foot, and that he had died a few days afterwards from locked-jaw; the inquest on that boy was taken on the first adjournment day of the inquest on Austin.

1157. Have you any reason to believe that the circumstances connected with those two inquests were communicated to the magistrates?—The rector of Hendon

don is himself one of the justices of the peace, and at the next meeting of the magistrates at quarter sessions he attended the court, and made a strong complaint against the coroner for his proceedings at Hendon.

1158. Did the justices take any steps in consequence of that representation?—At that meeting of the magistrates, which was on the 11th of October, after the Rev. Mr. Williams had made his statement and his accusation, Mr. Laurie, another magistrate, moved that the accounts which the coroners had rendered of their fees and disbursements from the middle of August to the 19th of September, should be referred back to the committee of accounts, in consequence of their not having been accompanied by sufficient vouchers; and at the same meeting a motion was made and carried for inquiring into the cause of the increase of inquests in the county. In the speech of the Rev. Mr. Williams, as it was reported in the newspapers, some very strong remarks indeed were made against the coroner, and at the inquest Mr. Williams strongly contended that there was no necessity for an inquiry into the case of Austin, and that the board of guardians, even before the pauper had died, had determined that there would be no necessity for sending to the coroner in the event of his death.

1159. Did those accounts which were referred back to the committee of magistrates contain a charge for the inquests on Austin and Coleman?—Certainly not; because those inquests had not been included; the account which was then furnished to the magistrates only extended to the 19th of September, and those inquests were held after that period.

1160. Had the magistrates on any previous occasion taken any step to institute a more rigid inquiry into the costs of the inquests?—Not to the best of my knowledge.

1161. Did the magistrates adopt any resolutions with respect to the inquest held on Henry Coleman?—That case formed one of thirty others which had been sent to me by the magistrates for explanation; I attended before the committee, and answered questions in relation to it and to others; and subsequently a resolution of the court was sent to me, declaring that the fees and disbursements in the case of Henry Coleman had been disallowed.

1162. Was the charge for the inquest on Austin questioned in any way?—I believe it has been stated before this Committee that it was questioned, and that an effort was made to get rid of the charge in that case, but it did not succeed, and ultimately the payments for both were allowed in full.

1163. Did the justices claim a right to determine whether inquests had been necessarily or unnecessarily held by the coroners?—They did; and they have set forth that claim in the report which is appended to the amended schedule.

*Veneris, 3<sup>o</sup> die Julii, 1840.*

MEMBERS PRESENT:

Mr. Gally Knight.  
Lord Eliot.  
Colonel Thomas Wood.  
Mr. Williams.

Sir George Strickland.  
Mr. Wakley.  
Mr. Williams.

LORD TEIGNMOUTH IN THE CHAIR.

Mr. Serjeant *Adams*, called in; and Examined.

1164. *Chairman.*] ARE you the chairman of the Middlesex bench of magistrates?—I am.

1165. I believe you have filled that situation for some years?—Five years.

1166. Mr. *Wakley.*] How long have you been in the commission of the peace for this county?—Five years; I was put into the commission on the occasion of a vacancy, and was elected chairman immediately afterwards.

1167. Are you a member *ex-officio* of the committee of accounts?—I am of all committees.

1168. Are you one of the visiting justices of the lunatic asylum?—I am one of the visiting justices of the lunatic asylum, appointed by the bench at large under the Act of Parliament.

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1169. Are

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Esq., M.P.

30 June 1840.

Mr.  
Serjeant *Adams.*

3 July 1840.

Mr.  
Serjeant Adams.  
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1169. Are you connected, in any way, officially with the new prison, or house of correction?—In no other way than as being chairman of the court; I am one of the visiting justices, *ex-officio*, of all the prisons.

1170. Until after the last election for coroner in this county, had any difficulty arisen in passing the accounts of the coroner?—To my knowledge, none; but I should state that, although a member of the committee of accounts, I never attend the committee of accounts unless on special occasions, and by the request of the justices; but I believe there was none.

1171. Until after the death of the late Mr. Stirling, do you recollect any proceedings in the court of quarter sessions, or in the committee of accounts, relative to the office of coroner for the county?—I do not.

1172. When the election of coroner was pending, arising from the vacancy which was caused by the death of Mr. Stirling, did the court of quarter sessions take any steps for the election of a third coroner for the county?—According to the best of my memory, the death of Mr. Stirling took place, while the court was sitting, on the 17th of January 1839; it was reported to me immediately by the clerk of the peace, and as Mr. Stirling was the clerk to the committee of accounts as well as coroner, I desired that it should be put into the official paper of the day, that immediate notice might be given to form a committee to inquire into the office of clerk of the committee, a course which we always adopt on the vacancy of any office. On the same afternoon Mr. Pownall came to me and told me he thought it would be requisite to have a third coroner, from the great increase of the business; I told him I was at that time excessively busy, and I would speak to him afterwards, but he had left the court before I had the opportunity; of course as chairman I never originate any proceedings, and the day passed. In the course of the following day, Mr. Pownall again spoke to me on the subject, and I told him that on referring to the usage on the subject, no steps could be taken but in the court of quarter sessions, and therefore it must remain over until the next sessions. I state this, because at the time of the communication made to me no candidates were known. When the first day of the sessions came, which was either on the 3d or 5th of February, Mr. Pownall then came to me to ask what was to be done, and on referring to the usage, I found the proceedings of the court of quarter sessions were generally formed on a petition of the freeholders; and considering that the real decision lay in the Chancellor, and the petition of the freeholders merely something to act on, I said, “You had better get a petition; we will adjourn this court until Thursday, and have the matter taken into immediate consideration.” It was so done, and a resolution was passed, that there should be an increase of coroners; I waited on the Lord Chancellor with the resolution, personally, the next morning. The Lord Chancellor’s answer was, that he did not think it necessary to interfere during the pending election, because there would be an equal power to increase the coroners without a vacancy as with one, and the proceedings of the sessions would be such notice to the candidates that whoever was elected could not complain at any future time, that another coroner was elected while he was in office. I reported that answer to the court of quarter sessions; it was entered on the minutes, and from that time the proceedings have dropped.

1173. When you state the proceedings were adjourned to the Thursday, do you recollect on what day of the month the Thursday happened?—If Monday was the 3d, it would be the 6th; if Monday was the 5th, it would be the 8th. The Court was adjourned for the purpose of giving sufficient notice to the magistrates.

1174. At that time the election had been appointed by the sheriff?—At that time the election had been appointed by the sheriff, and the candidates were reduced to two, Mr. Wakley and Mr. Adey, Mr. Burchall having resigned before; but the election had not been appointed by the sheriff, or the candidates known, when the first idea of having additional coroners was known.

1175. Do you recollect whether there were any allegations made in court at that time, that there had been any unnecessary inquests taken in the county?—I do not think there were.

1176. And that the increase of the business of the coroner’s court rendered it necessary to elect a third coroner?—I remember there was a paper produced, which I have no doubt is now in existence, showing the very great increase that has taken place in the last three or four years; but no inquiry into the cause of it.

1177. That



1177. That paper being produced as a statistical statement, showing the necessity of appointment of a third coroner?—Certainly; and I put it before the Chancellor.

1178. Do you recollect whether it was alleged in the court at that time as a complaint that any of Mr. Stirling's inquests had been taken by deputy?—Certainly not.

1179. Have any difficulties occurred with regard to the coroner's office since the successor of Mr. Stirling has been elected?—I do not know well what you mean by difficulties occurring with regard to the office; if you mean that the coroner and the magistrates have not been on some occasions good friends, it certainly has been so.

1180. Do you recollect whether any complaint was made against Mr. Stirling's successor at the court of quarter sessions?—No; I remember no complaint made against Mr. Stirling's successor, personally; I remember a complaint being made that the number of inquests had increased; that attached to both the coroners; and I say with some hesitation, but, according to my belief, the opinion of the court was, that the complaint attached more to the other coroner than to Mr. Wakley.

1181. Do you recollect whether a complaint was made against the coroner of the western division in October?—I recollect a complaint being made by an individual justice upon that occasion.

1182. Have you any recollection of the nature of that complaint?—It was for indelicacy of conduct, in disinterring a body that had been buried, and in taking an inquest unnecessarily.

1183. Taking an inquest unnecessarily was the upshot of it, was it not?—No; it involved both; Mr. Williams complained that Mr. Wakley had issued an order to him to disinter a body; he denied Mr. Wakley's authority to do so; Mr. Wakley stated, he had an authority; and then Mr. Williams said, "If Mr. Wakley chooses of his own authority to have the body disinterred, I shall offer no obstruction; but I will not myself do so:" that then Mr. Wakley did issue an order; that the body was disinterred during the time Mr. Williams was performing service over a body in another part of the church-yard: that Mr. Wakley ripped open the shroud and exposed the body; that Mr. Williams remonstrated, and he then said, "You might as well hold an inquest on some other case;" and Mr. Wakley, on hearing the circumstances, said, "I will hold that inquest;" and did do so. Such was the outline of the complaint, according to my memory. It was not that complaint of Mr. Williams that occasioned the accounts to be referred; I think it was something that was said on the great increase of inquests and fees.

1184. Lord *Eliot*.] At that meeting, was the question of the legality of the proceeding of Mr. Wakley, and his authority to cause the disinterment of the body, made a matter of discussion by the magistrates?—No; I believe no one ever doubted Mr. Wakley's right to disinter the body.

1185. Did Mr. Williams not doubt it?—No.

1186. Mr. *Williams*.] Did not Mr. Williams dispute the necessity of holding an inquest on that body?—That I cannot tell; I can only tell what took place before the court; I am answering to what passed before the court.

1187. Did he state to the court he considered there was no necessity for holding that inquest?—According to my impression, he only at that time complained of the manner and conduct of Mr. Wakley in taking that inquest, and not of his right to take it.

1188. What right had he to complain of the coroner adopting a course necessary for the performance of the duties of his office, if he could allege no reason against the necessity of holding the inquest?—You must ask him that; I am only stating what passed in court; what reasons there might be behind I know not; he complained of the indelicacy of the conduct of Mr. Wakley in exposing the body to the public gaze in the state it was, and denied his right to order him as clergyman of the parish to disinter it.

1189. *Chairman*.] If there was no complaint on the part of Mr. Williams of any want of necessity in holding the inquest, on what ground were the fees disallowed?—At present my answers are confined to what took place at one meeting, and on that occasion it was merely a speech, and no motion was made upon it; the accounts produced were referred to the coroner for want of vouchers, the

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inquest in question not forming part of those accounts; that inquest was not before the court, the coroner not having then made his return, and therefore the court had nothing to do with it.

1190. Mr. *Wakley*.] Do you recollect whether Mr. Williams stated to the court at the time that when the coroner had the body disinterred, it was his third visit for that purpose?—No, I do not remember that.

1191. Did he state that the court had been previously twice adjourned, in order to obtain the disinterment of the body?—No, I do not recollect that he did; I cannot remember all the minutiae; a person who sits for hours to hear speeches cannot be expected to remember every thing that was said.

1192. Do you recollect whether he stated that the churchwardens had positively declined, and had absolutely refused to allow the sexton to aid in the disinterment of the body?—I think he said this: that the coroner had not only ordered him to disinter the body, but the churchwardens also, and he denied your right to order either one or the other; he never denied you had the individual right to disinter it, or to appoint any officer to do it who was willing to do so.

1193. Did he state with reference to the funeral, that the coroner had adjourned the inquest from the Wednesday to Friday, at 4 o'clock in the afternoon, at his own request, and that he had appointed that very hour at his own request?—I think he did; I know this, there was no imputation made against the coroner, that he had wilfully adjourned that inquest to a time when a body was about to be interred; his only complaint on that subject was, that he had requested Mr. *Wakley* not to proceed until the service was terminated.

1194. Did he state that the moment the curate came to Mr. *Wakley*, and informed him a funeral was in progress, that Mr. *Wakley* sent his clerk into the church-yard, directing that the men should instantly desist from work until the funeral terminated?—I have no recollection of any such statement.

1195. Do you recollect whether he made any reference on the occasion that he brought forward that complaint, to the report in *East*, respecting the decision of Lord *Ellenborough*, in the case of the *King* and the *Justices of Kent*?—I think not, upon that occasion; I have no remembrance of it.

1196. You have no recollection of his having said, in the case in *East's Reports* it was held, that where there was not a fair and reasonable ground of suspicion of violence, that the interference on the part of the coroner was not to be remunerated?—I cannot charge my memory with all these particulars; I should say not at that time, although that case, and the rights of the coroners upon it, was frequently the subject of discussion afterwards.

1197. *Chairman*.] Are you of opinion that the magistrates have the power conferred on them by the Act of *George II.*, of determining whether an inquest is held "duly" or not?—That the magistrates have the power of determining whether an inquest has been "duly" held, I can have no doubt, after the decision of the case of the *King* against the *Justices of Kent* reported in *East*; but as to what is meant by the word "duly," has been to me a subject of very painful doubt and consideration.

1198. You do not, then, understand it as signifying, without any question whatever, "necessarily"?—It is upon that part of the subject that I admit I have great difficulty in making up my mind. The "necessity" of an inquest does not depend upon the result of the inquest, nor does it depend upon the evidence produced at the inquest. It is perfectly possible, aye, and probable, for the coroner to receive information which would render him indictable if he did not hold an inquest; and yet when he comes to hold the inquest it may be one quite unnecessary to have been held. At the same time, it would be very dangerous to say, that the coroner has a right to hold an inquest upon every case in which information may be brought to him which may apparently justify him in holding it; but then that is a question of good faith.

1199. If you do not consider the term "duly" as signifying "necessarily," to what can it apply but to the mere informality of the proceeding?—Assuming the difficulties which I have pointed out to be valid difficulties, and assuming that the court of quarter sessions, therefore, are not the tribunal to judge of the "necessity" of an inquest, it then could only apply to the informality in the taking of the inquest, about which I have not the slightest doubt. I am by no means prepared to say that they have not the other jurisdiction; but it is extremely full of difficulties.

1200. Then

1200. Then you are of opinion that considerable difficulty exists, not only in your mind, but generally, as to the interpretation of the terms of the statute?—I think so; and the more I think upon the subject the more perplexed I am; for whilst I cannot allow the coroner is to ride over the county, and to hold inquests wherever he pleases, necessary or not, I can at the same time see very great difficulty in any tribunal having to judge of his conduct, when they must judge of his conduct, not by the evidence which is produced at the inquest, but the preliminary evidence which had been laid before him, and upon which his warrant had been issued.

1201. Then, taking into consideration the great importance of the proper exercise of discretionary power in such cases, and also the inconveniences and difficulties to which the coroner is subject, namely, of being indicted for a misdemeanor, and sued for not paying fees in the event of his holding inquests, the charges of which are afterwards disallowed; the coroner being also liable to costs in the event of his applying for a *mandamus* in the Queen's Bench, and the inquisition being quashed; taking all these circumstances into consideration, and admitting the difficulty which you stated to exist in your mind, and to exist generally as to the nature of the law, do you not think it would be desirable that some alteration of the law should take place, and that the terms of the statute should be more accurately defined?—The coroner can already be proceeded against by indictment; he may already be removed by the Lord Chancellor for misconduct; in either of those cases there is the means of examining witnesses on oath by two competent tribunals; I do not see how you could substitute a better tribunal than the justices, independent of the other tribunals which already exist, namely, the proceeding by indictment and proceeding before the Lord Chancellor; the fault of the tribunal before the justices is this, that they have not the power of examining witnesses on oath on the occasion, and have no means of arriving at a knowledge of the facts but by an examination of the coroner himself.

1202. If a difference of opinion exists among the magistrates as to the interpretation of the statute, and you yourself acknowledge the terms of the statute to be undefined, does not the jurisdiction of the magistrates become, consequently, in a great measure incompetent?—A better definition of the meaning of the word “duly” in the statute would be very desirable; but my previous answer was directed to the substitution of another tribunal; I do not see that you could have a better tribunal (excepting the other two which you have) than the justices.

1203. My question referring to the better definition of the term “duly,” and not to the alteration of the jurisdiction, it is your opinion it would be beneficial to have that more accurately defined?—Certainly, there cannot be a doubt about that; with regard to the power of the magistrates, I should wish to say it is absolutely necessary the accounts should every quarter be vouched, either before the justices or by some other tribunal appointed so to do; and I do not see how you could appoint a tribunal to vouch the accounts better than the justices themselves.

1204. Lord *Eliot*.] I understood you to say you are not able to pronounce an opinion as to the power now possessed by the magistrates, of deciding whether or not inquests have been held necessarily; is that so?—Yes; the interpretation of the term “duly” perplexes me much, as applied to a tribunal which has no power to examine witnesses on oath, and whose sole power extends to the examination of the coroner upon oath.

1205. Do you think it desirable that such a power should be distinctly vested in the magistrates?—That is again an extremely difficult question to answer; to take from the magistrates all power over the coroner would be actually to let the coroner run wild, for there is no other power over him but the justices that can fairly control him; and yet I am by no means prepared to say it would be advantageous that an inquisitorial power should be exercised over every inquest that the coroner takes, and that he should be compelled *seriatim* to prove every one of them were just.

1206. Would not the holding of an “unnecessary” inquest be a fit matter of complaint to the Chancellor, and would not the Chancellor have the power of removing the coroner, supposing such a charge to be substantiated by witnesses on oath?—The difficulty would be, if you take away the jurisdiction of the justices, to find parties to put such a complaint in motion; the payment of the coroner's fees comes out of the county funds; over that county fund the justices alone have control; if their act is merely to be ministerial, to pay what comes before them, who is there who would have sufficient interest to bring the subject-matter before the Chancellor, or by way of indictment?

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1207. Who have sufficient interest now in the supposed cases to which you refer?—The magistrates.

1208. Would they not have the same power in this instance?—No, you would take it from them; there is no doubt there is a sufficient controlling power over the coroner in the Court of Queen's Bench and the Chancellor, if you find persons to put it in motion.

1209. Did I understand you to say, that the power existed in the Lord Chancellor, of removing the coroner from his office, supposing a complaint of misconduct to be substantiated by any one on oath?—Yes.

1210. Would not such power extend to the supposed case of holding unnecessary inquests?—Certainly.

1211. Colonel *Wood*.] By what statute is it that you say the Chancellor could remove the coroner?—It is not a statute; the institution of the coroner, and all the rights belonging to it, are long before any written statute; in fact, the office itself is involved in impenetrable obscurity; what its duties are, the more we search, the more we are perplexed to find.

1212. Lord *Eliot*.] And do you not suppose the parties who would proceed against the coroner in the supposed case of misconduct to which you previously referred, would equally proceed against him for holding unnecessary inquests, and thereby occasion unnecessary expense to the county?—In the case of extortion, there is a party who has an immediate interest; the party against whom the extortion is made; other cases may arise in which individuals may from other causes have an interest sufficient to set the law in motion; but if you make the magistrates ministerial only, the difficulty will be in finding any one who will interfere at his own personal cost, risk and expense, to indict a coroner for holding an unnecessary inquest. No man would do it unless he had some personal motive in it. That is the real difficulty.

1213. Sir *George Strickland*.] Then considering that the coroner holds a very responsible situation in the light of a magistrate or a judge, do you think it is the general policy of the law of England to place in such an officer very wide and large discretion?—Not in an officer so elected; there is no qualification, mental or personal, required; the coroner is elected by the freeholders at large, not from any particular body of men; they may elect any one; you may have a person elected by the freeholders wholly and entirely incompetent to perform those duties; he comes from no class; he is the sole judge in this kingdom elected by popular election.

1214. Mr. *Wakley*.] How are the sheriffs of London and Middlesex elected?—They are not judges.

1215. Do not they act judicially?—When I say he is the sole judge so appointed, I should speak with the qualification, that the sheriffs of London and Middlesex are so elected; but they are not criminal judges, and never act personally; they act always by their under-sheriffs.

1216. By deputy?—It is by deputy.

1217. They have the power of acting, if they choose?—They have the power, but they never do it.

1218. *Chairman*.] How are the under-sheriffs appointed?—They are appointed by them, but they are always experienced officers.

1219. Mr. *Wakley*.] How is the recorder of London elected?—By the aldermen.

1220. How is the common-serjeant elected?—By the common council; I call neither of those popular elections, in the sense I used the word in the former case; those are elected by persons who have been elected themselves. I am speaking of a general election by a large body of freeholders, which might be well understood by the word "popular" election.

1221. Sir *George Strickland*.] In the counties of England you are aware the sheriff is appointed by the Crown?—Yes.

1222. And that he is a judge?—No, not a judge.

1223. In his own court; in the sheriff's court?—Not a judge, in that sense of the word; I am speaking practically; the sheriff is appointed by the Crown, but he never acts judicially himself, his under-sheriff always does, and in practice his under-sheriff is or ought to be a man of experience, generally is so. The instance mentioned by the Committee would be rather confirmatory of my opinion than otherwise.

1224. The sheriff in a county holds a very ancient and established court for the trial of various offences and actions; if any thing occurs to prevent the  
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sheriff from acting, the coroner becomes then the sheriff of the county; does not the coroner then stand in the situation, to all intents and purposes, a judge in the sheriffs' court?—It depends on whether we are speaking theoretically or practically; there can be no doubt, in ancient times, the coroners must have been people of the highest consideration, for the freeholders, as they existed in those ancient days, were the lords of the soil and the great men of the day. I take the coroner to have been, some six centuries ago, the greatest man, or nearly so, in his county; and if you examine old records you will find they have acted as judges, as conservators of the peace, and as magistrates.

1225. Mr. *Wakley*.] Are you acquainted with any statute that has expressly diminished any of those powers?—I rather think there is a statute which prevents their acting as magistrates; I am not quite confident upon the point; I have only heard so; there is an Act which explains what they are to do with respect to taking inquests, and that would rather lead one to believe the coroners were at that time abusing their office by taking inquests improperly; that is a very early statute.

1226. Mr. *Gally Knight*.] Would you not say the coroner, in this day, is a fragment of what he was in former times?—Precisely.

1227. And that he has become so, rather by the circumstance of particular parts of his office having fallen into desuetude, than from any special statute having passed with regard to them?—That is precisely my opinion.

1228. Still you say those parts of his office are lost from desuetude?—Yes.

1229. Just as much as if a statute had been passed?—I take it so; no coroner at this time of day would attempt to exercise these absolute powers; if he did, the effect would be an Act of Parliament to prevent him; that which is useful has remained; that which has become useless is gone.

1230. Mr. *Wakley*.] Had he not power to take inquests on persons wounded and not dead?—Yes; and he had power as to indictments.

1231. Lord *Eliot*.] Do you think it expedient, where the necessity of an inquest has been disputed, to give to the magistrates the power of examining witnesses on oath?—No, I do not; the effect of that would be to bring parties before the justices to make complaint against the coroner, who might have taken offence at the mode in which he had conducted the inquest; those who complain in that way should go with an indictment to the Queen's Bench and not to the justices. I think the power of examining the coroner on oath, as to his accounts, a very useful one, but I would not go beyond it.

1232. If the check of an oath is removed, may they not make any statement they please with regard to the circumstances under which an inquest has been held?—I do not think we ought to take such statements.

1233. Is it not the practice to examine witnesses on such occasions?—I believe not.

1234. To make inquiries of parties?—I believe not; I rather think the whole of this has arisen from a little feeling which seemed to exist at the moment in which the great body of justices of the county do not certainly partake.

1235. Then how, if the justices do not make inquiries, and do not examine witnesses, do they decide on the necessity, or otherwise, of holding such inquests?—I know of no case where they have decided upon it, excepting one.

1236. And in that case how did they act?—That was the case of Coleman, and that was decided by a committee; I came into the committee during the time, and pointed out that I thought we had better adjourn the proceedings; and my impression was, that the decision was not entered on the minutes; but it turned out that it was, and it subsequently appeared in the report that was laid before the court. By a very singular accident that report was read on a day when there was an election for the chaplain; a great noise prevailed in the court at the time; I turned to the chairman of the committee of accounts, and asked him "if there was any thing particular in the report;" he did not attend to me, said "no," and the confirmation of that report passed *sub silentio*. When the minutes were sent for my approval, to my great astonishment, I found we had confirmed the disallowing of an inquest without knowing it; and I then did that which I thought I was bound to do, offer to the court an explanation at the next county day, of the error into which I had been led, made my apology, and the chairman of the committee of accounts desired he might bear his share of the blame, as well as myself; the matter was referred back again to the committee, and the

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committee have allowed the accounts of that inquest, so that I may now say, I know of no instance where an inquest has been disallowed.

1237. Mr. *Wakley*.] Did not the fees and costs of that inquest remain disallowed for several months?—It continued disallowed until I could make my statement at the court the next county day; until the committee could be appointed at a subsequent one; until the committee could re-consider and report, and there were several months intervened, as there necessarily would be, from that combination of circumstances.

1238. Lord *Eliot*.] As you think it desirable this power should be vested in the magistrates, but as you do not think it desirable they should examine witnesses, how do you propose they should qualify themselves to form an opinion?—This question forms a syllogism, and such questions are difficult to answer; I state that there are difficulties attending it in any view of the case; I feel those difficulties; but speaking practically, not perhaps logically, I believe the matter is better left as it is, and that no practical inconvenience will arise from it.

1239. Colonel *Wood*.] Although you state the law is not very clear as to what inquests are duly taken, yet, practically, you do not consider any change in the law is requisite?—I do not indeed, without the whole office of coroner is to be revised.

1240. *Chairman*.] You stated in a former answer you thought it very desirable that the terms of that statute, which has been alluded to in the former questions, should be more accurately defined?—Undoubtedly I think that; but that is not an alteration in the law; it is merely pointing out what the law is. The question is not as to what inquests shall be taken, but what inquests the coroner shall be paid for; no one denies his right to take inquests; and I verily believe if he was to exercise his rights to their utmost extent, that he might become an officer so oppressive that he would be unendurable; the question here is, not as to his right of holding the inquests, but whether he shall be paid for those he does hold.

1241. Mr. *Gally Knight*.] I want to know whether I am correct in my understanding of your opinion, that the magistrates have a decided power of disallowing his charges?—If the inquest has not been “duly” held, most certainly.

1242. And in that way they have an indirect control over the coroner?—They have clearly an indirect control over the coroner, as far as the mileage is concerned, and the amount of fees paid to witnesses; but they have no control over the coroner’s power of holding inquests. He may hold inquests in defiance of them, and he has the power of holding as many inquests as he pleases.

1243. He may hold the inquests, but they may disallow his charges?—Yes; the practical difficulty arises from the engrafting the provisions of statute law on the ancient common law; so long as the coroner was not paid for his inquisitions it was pretty evident he would not take them unnecessarily. The statute of George the Second then comes in, and gives him fees for taking inquests or increases his fees; and then comes the statute of Victoria, upon which the difficulties arise. Now the coroner is placed in this singular position: if he takes an inquest he is compelled to pay all the witnesses who are summoned to it, and he must of necessity be subject afterwards to an inquiry whether that inquest has been “duly” held before those fees can be allowed.

1244. That leaves him under the control of the magistrates?—That leaves him under the control of the magistrates, as to whether the inquest was duly taken; what the meaning of the words “duly taken” is, is what I wish to have settled.

1245. Mr. *Wakley*.] Do you consider the magistrates have now the power of determining whether an inquest has been necessarily or unnecessarily taken?—We have nothing to do with whether it is necessarily or unnecessarily taken as magistrates, because the coroner has a right to take any inquest he pleases; the simple question for the magistrates to determine is, has it been “duly taken;” whether by those words is meant, is it an inquest which he ought to be paid for, or is it an inquest in which he has complied with the proper forms, should be more clearly defined by the statute than it is.

1246. That is an alteration in the state of the law you would recommend?—Not an alteration in the state of the law, but a definition of the law.

1247. Colonel *Wood*.] Upon what ground was it that the inquests were disallowed

allowed by the Middlesex magistrates?—Several inquests were disallowed by the Middlesex magistrates, because they were taken before a deputy, and consequently were not inquests at all.

1248. Upon what ground was Coleman's case for some time under consideration, and then afterwards the expense of that inquest allowed?—Coleman's case was originally disallowed by the committee, on a notion that it was an "unnecessary" inquest.

1249. Lord *Eliot*.] Upon information, how obtained?—That I cannot tell you, because I was not present at the time; I came into the committee just before the decision, and in the ultimate report, in which the committee recommend that the expense should be allowed, the causes I believe are stated why they think it should be allowed.

1250. Did you think the committee had or had not a legal right to determine the question?—That is the same question which has been so frequently put to me in such a variety of shapes, and to which I can give no satisfactory answer until I have been told what "duly" is.

1251. I ask you not as to the matter of right, but whether you did express an opinion as to the power of the magistrates to pronounce such a decision?—Do you mean on that committee?

1252. Yes.—No, certainly not.

1253. Or in court?—No, nor in court.

1254. You expressed no opinion upon the subject?—Yes, I have expressed an opinion of doubt and difficulty, but no other.

1255. Colonel *Wood*.] And it being a question of doubt, it was thought by the majority of magistrates it was much better to allow the inquest, and to avoid any further discussion?—Yes, certainly that was so; and I had doubts myself whether that inquest was not, from all I had heard, a right and fit inquest to be taken.

1256. Mr. *Wakley*.] Have you any doubt the coroner might have been fined for not taking that inquest?—That is involved in the other answer.

1257. *Chairman*.] Do you think the magistrates, convinced as they are of the difficulty of making effectual inquiries into the necessity of holding an inquest, and also fully aware of the serious consequences that would result to the coroner in the event of his having paid fees and charges, which they disallowed, would never exercise their power of disallowing those charges unless under very urgent and extreme cases?—I have no notion of a body of justices in any county in the kingdom exercising such a power capriciously and wantonly.

1258. Do you not think, supposing (as seems to have occurred in the case of Coleman in the first instance) there may have been something of haste or oversight or imperfection in the proceeding, that that would be overruled by the general decision of the magistrates?—The result of Coleman's case is an answer to that question.

1259. Mr. *Wakley*.] Are you aware that 48 inquests on one occasion were selected by one of your committees of magistrates, and that those cases were sent to the coroners for explanation?—No; I tell you I never attend the committee of accounts; indeed, as far as the coroners' accounts are concerned, it is impossible I should, because they are always taken during the sitting of the court.

1260. At the time that Coleman's case was discussed in committee and disallowed, did not that case form one of 30 which were then under discussion; and did not the magistrates stop with Coleman's case, in consequence of a resolution which you submitted to the committee?—I went into the committee, and there were some cases (I do not think any thing like 30) under the discussion of the committee; Coleman's case was the first in order, and it was resolved that the fee should be disallowed on that case; I then stated to the committee that I thought we were very premature in coming to any decision on the subject, until the committee appointed to investigate the coroners' fees and accounts generally had made their report, and therefore I recommended that all the cases should be adjourned until that report was received; they came to a resolution to that effect, and my own impression was, that that resolution applied to Coleman's case also, but having been passed, it remained on the minutes of the committee.

1261. Supposing the costs of inquests to be disallowed in that way, what is the remedy of the coroner?—Application to the Court of Queen's Bench for a *mandamus*.

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into the "necessity;" I by no means say they were wrong; I only say, on my own mind there is and always has been a doubt.

1292. The statute says "duly," and you have drawn a very proper distinction between "duly" and "necessarily;" but if I understood you correctly, the magistrates assumed that they had a right of judging as to whether an inquest was held "necessarily" as well as "duly"?—Not whether it was "necessary" as well as "duly"; they assumed the word "duly" in that statute, as interpreted by the case in *East*, meant "necessarily." There is a case, in which I can show you the judges have held the word, "every married woman" to include "unmarried women."

1293. Mr. *Gally Knight*.] When you are speaking of the magistrates, you are speaking of the magistrates of Middlesex?—Yes.

1294. Mr. *Wakley*.] Do you consider it would be a sound state of the law for magistrates to possess the power of determining whether an inquest had been necessarily or unnecessarily taken?—I have already said, I do not think their powers ought to be enlarged on the subject, as regards the examination of witnesses on oath; but that, as it at present exists, namely, the power of taking the answers given by the coroner himself on oath, I see no objection to it.

1295. You think the power they now exercise is sufficient?—Yes, as far as they are concerned, I think it is, there being the other remedies.

1296. What authorities have the control of the County Lunatic Asylum?—That asylum is regulated by Act of Parliament, which vests the whole power for its guidance and government in a committee of the visiting justices, to be chosen annually by the bench at large; no other magistrates have any power over that asylum, and not even a right to enter it, except under the permission of the visiting justices.

1297. Now, if the patients in that institution were treated cruelly, and were neglected, which certainly is not the case at Hanwell, so that human life were lost in consequence, through whose instrumentality would the controlling authorities be made amenable to the law?—I know of no control over the visiting justices, but removal of them from their office as visiting justices.

1298. Suppose lives were lost in consequence of defective or cruel regulations, and inquests were held on the dead bodies of the persons who had died in consequence of the defective arrangements there, through whose instrumentality would the controlling authorities be amenable to the law?—In the case you put, there would be a verdict either of manslaughter or wilful murder against certain individuals, and they would be tried by the ordinary tribunal as any other person against whom any such inquest was found.

1299. Who has the control of the gaols in the county?—The justices at large.

1300. If the prisoners were to die in the gaols in consequence of bad and defective regulations, or insufficiency of diet, who is there to bring the controlling authorities to be amenable to the law?—I do not really understand the meaning of the question; when persons die in gaols, whatever may be the cause of death, an inquest must be held; assuming a verdict to be pronounced by a jury of wilful murder or manslaughter against either the gaolers or against the visiting justices, or against any other persons, they would be amenable to be tried on that indictment, assuming that any thing like personal misconduct was shown as against the visiting justices, or against any other person in the commission which did not amount to an offence in law, his conduct might be represented to the Lord Chancellor, and in such case, as in the case of any other misconduct of persons in the commission, he might be struck out of it.

1301. Are not the justices of the peace, in a great number of instances, *ex-officio* guardians of poor-law unions?—By the Act of Parliament they are so.

1302. Is it not the duty of the magistrates to order relief to the poor in cases of urgent necessity?—Not now, I believe; it used to be before the Poor Law Amendment Act; I take it that has taken the whole power of relief out of the hands of the justices.

1303. Bearing in mind the duties which the coroner would have to perform on occasions such as I have named, do you consider that it is consistent with a sound and efficient exercise of the functions of the coroner, that the justices of the peace should have the power of determining whether he had necessarily or unnecessarily taken any inquest?—I think your question is not applicable, as far as the gaols are concerned, and it is answered in this way; you must of necessity have an inquest there by the Act of Parliament. In case of any death  
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in the Hanwell Lunatic Asylum, the governing body of the asylum is only a small number of the justices, and I have no idea that the body at large would act differently in the case of an inquest taken by the coroner at the Hanwell Asylum, from what they would at any other place.

1304. Are you aware that the expenses of the inquest on Coleman were disallowed by a quorum of only three justices, and that with two of those justices the coroner had had personal contention?—That is not so, in point of fact; there were nine justices present at the time when the expense of Coleman's case was disallowed; the question refers to a meeting of the committee, who made the report to the bench of that disallowance.

1305. Which committee consisted of the three I have named?—That committee consisted of three gentlemen, of whom I hear from you there had been a personal dispute between you and two of them.

1306. *Chairman.*] If death should occur in the lunatic asylum or in a gaol, it might arise from the neglect of the immediate officers of the establishment, in that case that neglect would come under the supervision of the visiting magistrates; do you think it possible that deaths could arise from any imperfect regulations of the magistrates?—I should think not; the asylum at Wakefield, in Yorkshire, which is a county lunatic asylum, used to hold inquests on every person who died in the asylum; about three years ago they gave up the practice as being unnecessary, useless and expensive.

1307. Do you think the magistrates could by any possibility screen any officer of the establishment who had been guilty of gross neglect?—Being one of the visiting justices myself, I ought perhaps to feel some delicacy in answering the question, but I confess I do not; I do not think it can be predicated of 15 gentlemen, that they would screen an officer who had misconducted himself.

1308. Under these circumstances, and considering further, that the accounts of the coroner and the consideration of the inquest would come under revision of a body of magistrates distinct from those of the visiting justices, although there might be some of the magistrates members of both boards; do you think it possible any abuse could result from the existing state of the law in regard to this establishment?—In my opinion, decidedly not.

1309. *Mr. Gally Knight.*] Do you conceive it would be for the public advantage that a judge, chosen by popular election, should be exempted from all control, and placed as a check on the conduct of the magistrates?—I should think it would be reversing the order of things very much to do so.

1310. *Mr. Wakley.*] Have you heard it proposed that the coroner should be placed beyond all control?—Not to my knowledge.

1311. *Mr. Gally Knight.*] If the coroner was emancipated from the control of the magistrates, to what other control would you propose, or would you think it convenient, he should be subjected to?—I have never considered the subject, and am incapable of giving an answer.

1312. *Mr. Wakley.*] Are you aware of any inconvenience which arose from the magistrates being merely auditors of the coroner's accounts up to the occurrence of the case in East, in 1808?—I am not aware that magistrates, up to that time, were mere auditors; I know not what transactions may have taken place, I only know there is no case in the books about it; I do not know, one way or the other, whether it was so or not.

1313. Can you recollect whether any case was cited on that occasion, showing the magistrates had ever exercised any other functions with reference to the coroners' accounts than that of auditors?—I do not think that there is any case cited in that case; but I have some notion of a coroner being fined many years back for misconduct, but I cannot call to mind where the authority is.

1314. Do you mean fined by one of the superior courts or before magistrates?—I really do not know.

1315. *Chairman.*] The 1st of Victoria, c. 68, which is called "the Coroners' Expenses Act," empowers the magistrates to alter and vary the schedule of fees; do you think that that in any degree interferes with the discretionary power supposed to have been vested by the former Act, and by the decisions of the judges and magistrates?—Previous to this statute the coroner could claim nothing beyond his fees and mileage; the witnesses and other attendants were not legally paid at all, but they used to be paid by common consent out of the parish funds; when the new poor law came into operation, the Poor Law Commissioners would no longer allow the charges to come out of the poor-rate, the consequence

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consequence of that was the passing of the 1st of Victoria, which gave the coroner a legal right to pay witnesses and other fees, or rather compelled him to do so, and gave him an additional fee to what he had previously had for his own services, as a remuneration for the money he must necessarily be out of pocket by these payments in advance.

1316. By this Act of Victoria, c. 68, the magistrates were empowered to make a schedule, and "to alter and vary" it from time to time; it has been stated that, inasmuch as they had only the power of altering and varying the schedule, they could not have the power of disallowing the fees altogether, and that interpretation of that statute would in fact put an end to the discretionary power vested in them by the statute of George the Second?—Such an interpretation is neither logical nor sensible; their having the power to make and vary and alter the schedule is a thing totally distinct from their inquiry as to whom these sums are to be paid.

1317. The magistrates in consequence of that statute formed a schedule in November 1837?—They did.

1318. They subsequently amended that schedule in December 1839?—They did.

1319. By that amended schedule the coroner was prohibited from paying fees to parochial constables or officers receiving fixed salaries or wages?—Yes, that is so.

1320. It appears that subsequently in January 1840 an explanatory order was issued, by which it was prescribed that payment should be made to no constable where there was a salaried constable in the parish?—That is not so much an explanatory order as an additional order.

1321. Do you consider that that additional order has the authority of the schedule?—I take it it has, because the schedule is nothing more than an order of sessions; it is not because you give it the name of schedule that its validity arises.

1322. You would not make any distinction between the amended schedule and the additional order?—I should think not, in point of validity; according to my recollection, there was a subsequent Act of the court adopting this order; I was a little uneasy at the way the order passed; I thought there was hardly sufficient attention given to the wording of it, or in looking to the effect of it; I remember perfectly well this order being passed, and I think it will be found subsequently a further order of the court was adopted upon it.

1323. You think, no confusion can arise from the issuing of such orders from time to time, subsequently to any regularly amended schedule?—I do not say that.

1324. Mr. Wakley.] Do you consider the order to be part of the schedule?—I should consider it to be a variation of it within the powers of the Act; but to make it valid, a copy of it should be deposited with the clerk of the peace, and another copy delivered to every coroner; whether that has been done I cannot tell.

1325. Do you think if a succession of those orders were made and not included in a schedule, or entitled as schedules, that they would be equally valid, and have equal force with a schedule prepared according to the Act?—I think they would be valid and have equal force, but I think it would be a very unbusiness-like course of conduct; but that is mere matter of opinion.

1326. You say you believe the court has power to alter and vary and rescind any sum which may be named in the schedule?—Altering and varying implies rescinding.

1327. Does not the Act require that the justices shall positively make a schedule of fees, allowances and expenses, which shall be adopted and paid on holding coroners' inquests?—Yes.

1328. Then do you consider that the justices, having made such a schedule, and having allowed those fees and expenses for two years, would then be empowered by this Act to rescind the whole of them, and to allow nothing?—Certainly; I do not understand what is meant as to "allowing nothing;" if they have found that the allowing fees to a particular class has been productive of evil, they have a right to take away the whole demand from that class; if they refuse to make any schedule altogether, the coroner must apply to the Queen's Bench for a *mandamus* to compel them.

1329. But

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1329. But having made the schedule, and having allowed the coroners to act on it for two years, do you consider it would be deemed to be a compliance with the law if they then rescinded all the allowances which had been previously made?—Do you mean, and made fresh ones?

1330. No, rescind them altogether, and made no future allowance.—I should say if they rescinded all their allowances, and made no fresh ones, that in point of fact they would be disobeying the statute, and would be compelled to make a schedule by *mandamus*.

1331. Do you find any thing in this Act which can justify the magistrates in directing their payments to be made to particular persons, thus altering the authority of the coroner?—No, they do not direct payments to be made to particular persons; they direct certain persons shall not be paid who have neither had loss of time nor expense incurred in attending.

1332. But inasmuch as the constables were paid before the Poor Law Amendment Act was passed,—as their payments were discontinued in consequence of that Act, and inconvenience had been declared to arise from the withholding of the payments, and this Act having been passed to remove that inconvenience and provide for the payments, do you consider that the magistrates have the power, under the Act, to direct the coroner to withhold all payments from constables?—I take it that the magistrates have a complete discretionary power to say what payments shall be made or shall not be made, subject of course to the exercise of that discretion being a *bonâ fide* exercise of discretion, and not a corrupt one. The allowance to constables, before the statute passed, was illegal; the statute passed for the purpose of legalizing such payments as the justices should think right; if the justices think that it is not right that the constable who pays no expenses, and loses no time in attending an inquest, should not be paid, they are, I think, acting strictly within the limits of their power in making such arrangement.

1333. If they can exercise that power, why can they not withhold all payments from all constables and all persons who were necessarily engaged in the summoning of juries and in holding inquests?—You reduce that again into a question of discretion and *bonâ fides*.

1334. I beg to call your attention to the preamble of this Act: “And whereas the holding of coroners’ inquests on dead bodies is attended with divers necessary expenses, for the payment whereof no certain provision is made by law, and such expenses have usually been discharged without any lawful authority for that purpose, out of monies levied for the relief of the poor, and it is expedient to make an adequate legal provision for the payment of such expenses;” is not that clearly a law to provide for the payment of the constables, they themselves having received a fee before this Act was passed?—I take it, not.

1335. What is the meaning of the words “such expenses,” in the preamble of the Act?—That is to say, for such expenses as are necessary.

1336. Read the preamble?—[*The Witness reads the same.*]—The effect of it is this. You must make legal provision for the payment of the necessary expenses, and it is thrown on the discretion of the magistrates to say what those necessary expenses are. The words “alter and vary,” show the continuance of the discretionary power; if they have allowed improper fees, they may be put right; those may be too large or too small; in the one case they should lessen, in the other, increase them.

1337. Do you interpret the words you have read to mean, that provision was to be made for the payment of the expenses of holding coroners’ inquests?—Of those expenses which the magistrates deemed necessary, I take it, the effect of the Act is to state, that some expenses are necessary; not to define what the expenses are, and to make the magistrates the tribunal who are to decide what expenses are necessary.

1338. Are you aware that the enactment of this law was caused by a circular which had been issued by the Poor Law Commissioners, declaring that henceforth the payment for the expenses of holding inquests should not be allowed out of the poor-rate?—I was not aware that it arose from a circular of that kind; I was aware it arose from the fact of the refusal of the Poor Law Commissioners to allow the expenses to be paid out of the poor-rate.

1339. Do you hold, that the payment of the constables, previously to the enactment of this law, out of the poor-rate was illegal?—Certainly; every payment was illegal.

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1340. To the constables?—And to every body else, except the coroner; the whole payments were illegal.

1341. How is the constable paid now?—What constable?

1342. The constable who summonses the coroners' juries.—I presume, if he is a salaried constable he is not paid at all under that schedule; the schedule will state that.

1343. He is paid or he is not for the performance of the duties which he now executes in summoning juries and in attending inquests; if he be paid, all payments being denied by the magistrates under this Act, out of what fund is he paid?—I do not understand the question. If you mean that the coroner for Middlesex now pays a salaried constable for summoning an inquest, he must of course pay out of his own pocket, as he is making a payment which the schedule does not authorize him to make, and there is no other fund to pay it from.

1344. Are you aware there is no such thing as a salaried constable?—If so, that part of the schedule would be inoperative.

1345. He is not salaried as a constable, he has a salary as a beadle?—If so, the schedule should be altered from the word "constable" to the word "beadle."

1346. It has been declared it is illegal to pay the constable out of the poor-rate?—Yes; that is, to pay the constable for summoning juries.

1347. Out of the poor-rate?—Yes, no doubt.

1348. If the coroner cannot pay him under this Act, how can the constable legally receive payment from any other fund?—He cannot for the act of summoning.

1349. Then the magistrates, by that schedule, have determined that the constables shall receive no payment for the performance of that duty?—If he be a salaried officer.

1350. If he be a salaried beadle?—If the question turns upon this, that the man is paid as a "beadle" and not as a "constable," but that he summons as a constable and not as a beadle, then the schedule, using the word "constable," uses an improper word; and it should use the word "beadle" instead; whether in fact it is so or not, I do not know.

1351. Do you not consider, on reading this Act, it was intended by the Legislature that all the expenses of holding an inquest should be provided for by the provisions of this Act?—All the necessary expense.

1352. Is not summoning a jury attended with a necessary expense?—That is the question in dispute; if the person who summons has a salary from the parish, and neither loses his time nor incurs costs in summoning the jury, the magistrates have said he ought not to be paid for such summons; whether rightly or not, it is not for me individually to pronounce an opinion, because I am one of them.

1353. Are you acquainted with any other county in which the payment is withheld from the constable?—I know nothing of the practice in any other county in England, one way or the other.

1354. Do not you consider, Parliament having provided for the constable in this way, that it was the intention of the Legislature so to stipulate for the performance of this specific duty of the constable, as to make him active and vigilant in the exercise of his duty?—I must give a lawyer's answer; I know nothing of the meaning of the Legislature but from what I see enacted, and it is difficult enough to find it out even then.

1355. Is it not clear this Act has declared that "divers necessary expenses for the payment of holding coroners' inquests having been usually discharged without any lawful authority, that it is expedient to make adequate provision for the payment of such expenses by this Act;" having declared that in the preamble of the Act, and seeing the provision for carrying it into execution in the clauses of the Act, have the magistrates of Middlesex, by their amended schedule, provided that the payment should be made out of the county-rate, as is provided by this Act?—They have provided those payments which in their judgment they deem necessary, and they are the tribunal who are to decide.

1356. *Sir George Strickland.*] The magistrates, in making this schedule, are bound by the words of the Act of Parliament?—Certainly.

1357. In making that schedule, do you think they have the power of travelling beyond the words of the Act?—Certainly not.

1358. Then, if instead of merely stating what fees the coroner shall allow, they have likewise put in words, prohibiting certain persons from being paid; is that acting within the words of the Act of Parliament?—Clearly; because they simply say

say such and such people only shall be paid, and they are not controlling whom he shall pay.

1359. *Mr. Wakley.*] Is it not a virtual exclusion of certain persons?—Not the least in the world; they must attend as witnesses, and must summon if they are ordered to do so; the county of Middlesex have considered, where no expense is incurred by the officer and no time lost, that no expenses should fall on the county by reason of his attendance on an inquest.

1360. Are you aware, in many cases, a constable is put to expenses in summoning a jury?—Then those expenses would be allowed under that schedule.

1361. If it is provided in this Act that the payment shall be made out of the county-rate, and if the constable is paid now out of the poor-rate, and not out of the county-rate, for the performance of his duty, are the provisions of this Act complied with by the justices?—He is not paid out of the poor-rate for the discharge of that duty, he is paid out of the poor-rate for the discharge of his duty as constable or beadle.

1362. Is he paid for the performance of his duty at coroners' inquests?—The intention of the Act is not to pay a man for performing a duty; the intention is to save him harmless from expenses, that is the meaning of the Act; it is upon the same principle that all witnesses are paid, or supposed to be paid, in attending courts of justice.

1363. *Sir George Strickland.*] If in the exercise of his duty as constable or beadle he summon a jury for the coroner, and is paid no fee for that, does it not arise as a consequence that he is paid out of the poor-rate for executing that duty for the coroner?—No; because his payment would be just the same, whether he executed that duty or not.

1364. Do you not consider summoning a jury for the coroner is an additional duty?—It may be an additional duty, but he gets nothing additional for it.

1365. *Mr. Wakley.*] Then, are the terms of this Act complied with?—I say it is perfectly immaterial whether, in my own opinion, they are or are not; one individual will say they are, another will say they are not; the body to determine whether they are or are not, are the magistrates, who have the jurisdiction upon the subject, and they have determined that it is not necessary, within the meaning of that Act of Parliament, to make any payment to salaried constables; they are the parties to judge, and none others.

1366. *Sir George Strickland.*] Is the summoning juries for the coroner attended with no trouble or inconvenience to the beadle?—It may be attended with trouble and inconvenience; but witnesses are not to be paid for trouble and inconvenience, but for expenses and loss of time.

1367. *Mr. Wakley.*] Would you place the duty which the constable has to perform in giving notice to the coroner, in summoning juries, in attending inquests, sometimes for 10, 12 or 20 hours, in the same category as the loss a witness may sustain by attending the inquiry?—The constable sustains no loss; if a witness sustains a loss, he is to be paid for it; a journeyman baker who comes to attend an inquest loses a day's work, and he would be paid for it; a constable who comes to attend the inquest loses nothing, and therefore would not have to be paid; that is the principle on which the schedule has been framed; whether rightly or wrongly I shall pronounce no individual opinion, because I do not think a magistrate should pronounce an individual opinion on the conduct of a body of which he is the chairman and moderator; that is my only reason for not doing so.

1368. *Chairman.*] Have not the magistrates considered the test of payments or not, whether the different parties to whom they prohibit payment are well paid, without reference to the fund from which that payment is made; for instance, domestic servants receiving regular wages from their masters; parochial constables receiving salaries from their parishes; metropolitan police constables regularly paid by Government; is not that the principle on which they have acted?—That is the principle on which they have acted.

1369. *Colonel Wood.*] What is the practice as to the metropolitan police, are they permitted to receive fees?—O, yes; the sessions allow them 1 s. 6 d. a day for their attendance; I am of opinion if that 1 s. 6 d. was reduced to 1 s. it would be a good thing.

1370. *Mr. Wakley.*] On what principle do you allow the police 1 s. 6 d. a day for their attendance, if you withhold all payment to the salaried constable?—We have reduced the allowance to 1 s. 6 d.; I say I should be glad to see it reduced

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lower. The question is not whether we have done wisely in not making an allowance to the constables upon inquests, but whether we do wisely in making allowance to the metropolitan police officers there.

1371. Does your schedule allow the coroner to make any payment to a constable in case he has plunged into the water to rescue a person from drowning, but failing to do so, an inquest is afterwards held on the body?—No; because however much the conduct of the individual should be applauded, it is not a necessary expense of the inquest.

1372. Do you consider a policeman who has discharged that humane duty, and who is called out of his bed on the following day when he is off duty to attend the inquest, should have no allowance?—That is a totally different question; it is impossible to form a schedule that should contain such an item in it as the one you are now speaking of. I should be very happy, privately, to assist in rewarding such a constable, and holding him up as a meritorious officer; but we cannot frame a schedule to meet cases of that kind.

1373. Would there be any difficulty in allowing payments to those police constables who were called out of their beds to attend inquests?—There would be great difficulty to form such a schedule, practically.

1374. The question has not been answered in distinct terms, whether the constables are now paid for the performance of their duties which they execute on the holding of coroners' inquests?—I think I have answered that before, by stating it is not intended they should be paid for the performance of a duty, but for the expenses incurred.

1375. How are they paid for the expenses incurred?—They incur no expense.

1376. Are you aware that they often do incur expenses?—If they do, those expenses clearly ought to be paid; and if the schedule does not allow the expenses to be so paid, it is defective.

1377. Colonel Wood.] Has any representation been made to the magistrates as to the inconvenience from the non-payment of these fees to constables?—Not that I am aware of.

1378. If such a representation had been made from the coroners, of course it would meet with fair consideration?—I should conclude so.

1379. Mr. Wakley.] Did not all the constables and the beadles of the county present a memorial to the magistrates on the subject?—Yes, they did; but their complaint was, they were deprived of their fees.

1380. Chairman.] Are you aware this regulation of the magistrates has been evaded in any part of the county?—I am not aware, of my own knowledge; I have heard it stated that it has been given in evidence here, that one of the coroners paid no attention to it.

1381. It has been stated by Mr. Baker, in his evidence to the Committee, that the law in his hands had become absolutely a dead letter?—I have heard he gave such evidence; and Mr. Baker will have on his oath to state, before a week is over, whether such be the fact or not.

1382. Lord Eliot.] Supposing a practice to exist in some parishes in the county of Middlesex for the unsalaried constables to place a warrant for the summoning juries in the hands of the salaried beadles, and to allow the salaried beadles to receive the fees to which they as unsalaried officers were entitled, would that be an evasion of the schedule of the magistrates?—O, clearly.

1383. And do you not know that such a practice exists?—I do not; but it would be clearly an evasion.

1384. Do you know that the practice with regard to the allowance made for the expense of inquests is different in almost every county in England, not only as it relates to the amount of fees themselves, but as to the persons to whom they may be paid; and that in some counties allowance is made to juries and in others not?—I have heard so.

1385. Chairman.] Is it the practice in the county of Middlesex, as in many other counties of England, to withhold payment from jurors?—Yes.

1386. Do you think it desirable the jurors should be paid; has the payment to jurors been attended with any abuse, in your recollection?—The question comes on me rather by surprise; but, as at present advised, I should say it is not advisable to pay jurors on coroners' inquests.

1387. Will you state your reasons why you think the allowance should not be made to jurors?—I think it is one of the best practical checks that can be devised as a preventive of abuses in the office of coroner.

1388. Lord



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1388. Lord *Eliot*.] Do you think it would be desirable, by a general enactment, to specify the items of expenses to be allowed by the magistrates, leaving the amount to their discretion?—I doubt the wisdom of legislating so minutely; you find when the Act is passed, something is omitted that ought to be in, or something is in which ought to have been omitted; you cannot legislate in such detail; that is my judgment.

1389. Do you recommend that the coroner should be remunerated by a fixed salary rather than by fees; and would such a mode of payment relieve him from the imputation of holding unnecessary inquests for the sake of fees?—I am not aware that such an imputation exists, and I do not think it does; with respect to the payment of the coroner by means of a salary, like most other propositions, it will have both its advantages and its evils; and I should be inclined to say, upon the balance of the two, that it is better it should remain as it is.

1390. Mr. *Wakley*.] Do you believe that the coroner can discharge his duty satisfactorily to the public, or exercise that authority which he ought to be enabled to exercise in his court, if he be continually subjected at the general quarter sessions of the county to the statements and charges made by magistrates of taking unnecessary inquests?—Supposing such a state of things to exist, I should say he could not; but I have no idea that such a state of things does exist.

1391. Have you yourself not heard at the general quarter sessions in this county, that a coroner has been charged with not only taking unnecessary inquests, but has been charged with swearing falsely, for the sake of his fees?—No, I never heard the latter charge made by any body; I have heard the former charge made in a speech. It is probable that very publicity elicited the truth, and the records of the county show that no such charge has been sanctioned.

1392. *Chairman*.] Are not all public functionaries liable at all times to imputations and attacks?—He would be a most extraordinary public functionary who was not; the better way is to pay no attention to them, I believe, but do your duty; that is the course I adopt.

1393. Lord *Eliot*.] Do you not think the withdrawal of the fees from the parochial officer, whose duty it is to give information of the deaths within his district to the coroner, may tend to relax the vigilance of such officer?—I would rather not give an answer to any question which relates to my own private opinion, as to any thing which is an act of the body at large, being their chairman; if I give an approval in one case, I must give a disapproval in another; I had better do here, as I do in the chair, abstain from giving an opinion on any matters connected with such subjects.

1394. Mr. *Wakley*.] Will you state who it is that regulates the fees and allowances to witnesses who attend the superior courts?—The masters of the several courts.

1395. Throughout the counties in the rural districts, how is it done?—Every case, wherever it is tried, originates in Westminster Hall, and the costs in every case are taxed by the masters of the different courts of Westminster Hall.

1396. Does the court of quarter sessions regulate any fees to witnesses other than those allowed in the coroner's court?—The court of quarter sessions regulates all the fees of witnesses on indictments, and other matters belonging to the court of quarter sessions; but it is subject to the approval of the two chief justices.

1397. Do you not consider it would be a prudent provision to submit the fees and allowances which are made by the court of quarter sessions in the coroner's court, also to the same tribunal?—I do not think it would, because I believe the signatures of the judges are pretty nearly formal or ministerial; I should say, as far as the court of quarter sessions are concerned, they would be eager and anxious it should be so, because it would remove the responsibility off their shoulders upon others.

1398. Mr. *Gally Knight*.] Are you of opinion a coroner can legally hold an inquest by deputy?—I should say decidedly that he could not.

1399. Are you aware that in boroughs he now can?—Yes; and it is a remarkable circumstance that the Municipal Reform Bill, which authorizes a coroner to appoint a deputy, makes no provision as to the qualification of that coroner, but enacts that his deputy shall be a lawyer.

1400. Do you think that it would be an improvement, or the contrary, if the coroner in the counties was permitted to act by deputy as he is in boroughs, on the same conditions?—I do not think it would be an improvement; the number

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of coroners may be increased, according to the exigencies of the county. The effect of allowing deputies would be, you would make the coroner's office a sinecure, and you would have no control over the deputy.

1401. Mr. *Wakley*.] Allow me to ask, whether your mind has been made up on that subject for any very long period?—No, it has not; I never considered the subject until the question arose in Mr. Wakley's case. In the pursuit of my inquiries, I lighted on the case of the King and Farrant, which decided it.

1402. Lord *Eliot*.] Was it known to the magistrates that Mr. Stirling was in the habit of holding inquests by deputy?—It seems to have been the practice, not only in Middlesex but in many other counties, to have held inquests by deputy. The case of the King and Farrant was a very remarkable case. The inquest in that case caused a great political sensation and excitement, and it was suddenly put an end to; application was made to the King's Bench to revive it; the Court of King's Bench decided it could not be revived, because it was no inquest at all, having been commenced by the coroner's deputy, and not by the coroner himself. It is a very remarkable fact, that there is not one word of censure on the practice to be found in the whole report, it merely seems to treat it as an ordinary thing. In regard to Mr. Stirling acting by deputy, some magistrates declare, that they never knew that he did exercise his office by deputy; some I have heard say, that they did know that he did so, and thought nothing about it; and there can be no question, from all the inquiry that has been made, that the exercise of the office of coroner by deputy was thought nothing about, one way or the other.

1403. *Chairman*.] There is no question as to its illegality?—None in the world.

1404. Do you know of an inquisition that has ever been quashed, merely in consequence of its having been taken by deputy?—I am aware of no case in the books on the subject, except the King and Farrant; and there are one or two more modern cases in which the point has been incidentally mentioned.

1405. Are you aware that the fees have been disallowed in Middlesex previously to the year 1839, on any inquisitions which had been quashed?—I am not aware of it; I know nothing of the matter, one way or the other.

1406. Lord *Eliot*.] Are you aware that any intimation was given to Mr. Wakley of the determination of the Middlesex magistrates, that the practice of holding inquests by deputy should be discontinued?—I am not aware of it, and I believe not.

1407. Mr. *Gally Knight*.] Are you of opinion, so far as you have been able to observe, that personal feelings have not mixed themselves up with any of the proceedings of the Middlesex bench of magistrates, in regard to the affairs of the coroner?—I should say, as far as the bench is concerned, certainly not.

1408. Mr. *Wakley*.] But what do you say upon the point, as far as the committees have been concerned?—I have never attended but two, and in both those committees the resolutions that were passed were favourable to the coroner; I do not think there could be any personal feeling there.

1409. Do you extend your remark to all the magistrates who have taken part in the proceedings?—You have told me yourself to-day, you have had a personal quarrel with two of them; but I will undertake positively to say, there is no political or personal feeling upon the subject with the body of magistrates.

*Martis, 7<sup>o</sup> die Julii, 1840.*

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MEMBERS PRESENT:

Mr. Wakley.  
Lord Eliot.  
Colonel Wood.

Mr. Williams.  
Mr. Gally Knight.  
Sir George Strickland.

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LORD TEIGNMOUTH IN THE CHAIR.

*Thomas Wakley, Esq.*, a Member of the Committee, further Examined.

1410. Mr. Williams.] AFTER the cases of Austin and Coleman and others, which you have described, had happened, was any complaint made at the court of quarter sessions, and did any discussion on the subject ensue among the magistrates?—Yes; complaints were made on one occasion that unnecessary inquests had been taken, and that the proceedings in the case of Austin had been improperly conducted, and that the inquest was unnecessarily held.

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1411. Was the coroner of the western division of the county accused of any impropriety of conduct, in the conducting of the business of his court?—Yes; with reference particularly to the case of Austin, also with reference to a number of inquests which had been taken, and likewise as to *post-mortem* examinations.

1412. Was the case of Coker mentioned in court along with that of Austin, on the 11th of October last?—I believe that case was also made the subject of complaint, on the ground that the boy had lived some time after he had met with the accident, and, consequently, that it was not a case for inquiry.

1413. A motion having been made for referring back the coroners' accounts to the committee of accounts, in consequence of their not having been accompanied by sufficient vouchers, were any other vouchers demanded of you relative to those accounts?—None whatever; and the clerk, as he has stated in this Committee, sent in with the account every voucher which he had been accustomed to forward, with the accounts of my predecessor, for the last 15 years.

1414. Were you requested to attend before the committee of accounts, and also before the committee which had been appointed to inquire into the alleged increase of inquests in the county?—Yes; I attended before both committees, at different times.

1415. Did you give any explanations before those committees?—Certainly; I answered all the questions which were proposed to me, but under protest; I denied that either committee had the right to require my attendance, or to compel me to give any answer with reference to any subject which was then proposed to be inquired into.

1416. Having protested against the right of those committees to institute such an examination, do you still consider that they had no power to enforce the attendance of the coroner on that occasion?—I still entertain that opinion; and the more investigation I have been enabled to give the subject, the more satisfied am I that they had no such power.

1417. A special committee of magistrates having made a report, do you agree with the terms of the report?—Generally I have no fault to find with the report; but there are one or two things in it which I think are very objectionable; the part to which I would more particularly refer, is that portion of the report wherein it is stated, "that with respect to the other part, requiring constables to give notice to the coroner in the several cases of death therein enumerated, the committee offer no opinion, as they do not think that the court could exercise any control over the coroner as to cases where he may think it right to hold an inquest; the power of this court, in their judgment, being limited to deciding whether

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ther the inquests which have been held were necessary or unnecessary, and ordering or withholding the payment of the coroners' fees accordingly." It was with reference to this portion of the report that 48 cases of inquests had been sent to the coroners for the western and eastern divisions, requiring that explanations should be given respecting them. I then contended, and still contend, that if it be in the power of the magistrates to determine whether inquests are "necessary" or not, that the discretion and the authority of the coroner are at an end; and in my opinion the office becomes a complete nullity.

1418. Are you still of opinion that the alterations in the second schedule are improper, and operate against the efficiency and utility of the coroner's office?—Certainly; and no opinion can be more strongly impressed on the mind of any person. The first schedule appeared to work with efficiency and give satisfaction, but I find that the altered schedule is productive of great dissatisfaction among the summoning officers.

1419. Do you believe that the Act of Victoria conferred on the magistrates the power which they have exercised, of withholding all payments from a certain class of constables employed at coroners' inquests?—Having examined that Act repeatedly, I cannot discover a single provision in it which confers on the magistrates any such power. When the Bill, out of which the Act arose, was introduced into The House by the then Solicitor-general (now Mr. Baron Rolfe), I recollect having been consulted with regard to the provisions of it before it was introduced to the notice of the Legislature, and certainly I did not understand that it was to contain any such provision; and now that it is an Act, I can discover no such authority in it.

1420. Does the Act of Victoria contain any thing with reference to any classification of the officers?—There is nothing of the kind, so far as I can discover, to be found in the Act; it is merely to empower the magistrates to make a schedule of the fees and allowances which may be lawfully paid on the holding of inquests. The preamble of the Act states, "That whereas the holding of coroners' inquests on dead bodies is attended with divers necessary expenses, for the payment whereof no certain provision is made by law, and such expenses have been usually discharged, without any lawful authority for that purpose, out of the monies levied for the relief of the poor, and it is expedient to make an adequate legal provision for the payment of such expenses; be it therefore enacted,"—consequently it appears by the preamble, and by the enacting clauses, that it was merely intended by the measure to empower the magistrates to make a schedule of those fees and allowances which should be lawfully paid out of the county-rate, which had been previously paid out of the poor-rate.

1421. Is it stated in the Act of Victoria, that after the schedule had been made, that the coroner can make the payments which are described therein, those payments having been declared to be lawful, at the holding of any inquest?—Yes, that is stated particularly.

1422. Do you consider that the magistrates can legally withhold from the coroner the repayment of the sums which he has disbursed?—I can discover nothing in that Act, in any statute, in common sense, or in any principle of justice or expediency, which would enable them to exercise such an authority; and I believe that if it could be exercised, it would operate with the greatest possible detriment to the due exercise of the functions of the coroner's office. If for inquests which might be very expensive, coroners had not the power of recovering the amount of the disbursements which had been made, and the disbursements and fees might be disallowed, and the magistrates might also determine that inquests were unnecessary, timid coroners would hesitate, and not hold inquests at all in many cases where such inquiries were absolutely demanded for the ends of public justice.

1423. Is the coroner compelled by the Act of Victoria to pay all the necessary expenses of the holding of any inquests, immediately on the termination of the proceedings?—He is; the words of the Act are as follows: "And whenever any inquest shall be holden on any dead body, the coroner holding the same shall, immediately after the termination of the proceedings, advance and pay all expenses reasonably incurred in and about the holding thereof, not exceeding the sums set forth in the said schedule, and which sums so advanced and paid shall be paid to the said coroner in manner hereinafter mentioned." If the coroner was not to pay those expenses, and was not to make the disbursements which are required by the statute, it would amount to such a case of misconduct on his part

as would subject him to be indicted for a misdemeanor, and consequently a removal from his office.

1424. Have the magistrates, notwithstanding these provisions, claimed the right of determining whether an inquest has been "necessarily" or "unnecessarily" taken?—They have; that assumption is discoverable in their report, a part of which I have just quoted; and it was also assumed in the case of Henry Coleman. In the last-mentioned instance, the magistrates resolved that the fees and disbursements should be wholly disallowed; but after certain proceedings and discussions in the court that resolution was rescinded, and the account has been paid without any deduction.

1425. Did the magistrates ever communicate to you any opinion of counsel on the subject?—No further than referring to a case in *East*; but I believe that in that case the question was not distinctly brought under the consideration of the court; and in the report the words "necessarily" or "unnecessarily" are not to be found, nor in any book on the subject that I have been able to examine.

1426. Are you aware whether the opinion of the law-officers of the Crown was taken upon the subject?—I believe it was not.

1427. Do you find any thing in the Act of Victoria which, so far as you can judge, empowers the magistrates to interfere with the coroner as to whom he shall send his warrants to summon the juries on inquests?—Certainly not; there is no provision in the Act of the kind; the magistrates are, as I have already stated, merely directed to make a schedule of the fees and allowances which shall be lawfully paid on the holding of any inquest on any dead body; and it does not appear by the provisions of the Act that there is the slightest authority given to them to exercise any interference with reference to the parties to whom the warrants for summoning juries are to be sent.

1428. Does the Act of Victoria distinctly provide that the expense of the inquest shall be paid out of the county-rate instead of out of the poor-rate, as formerly?—It was for that especial purpose that the Act was passed.

1429. Are the conditions of the Act fulfilled?—Certainly not; because the constable, who now receives a salary as a beadle, if he be paid for performing the duties of the coroner's office, is not paid out of the county-rate as the Act directs; he receives no payment whatever out of the county-rate, although this Act has expressly declared that the expenses of holding inquests shall be paid out of the county-rate.

1430. If the expenses of holding the inquest are still paid out of the poor-rate, do you consider that that is an illegal mode of paying any part of the expenses?—I find it to be impossible to hold any other opinion; because after the Poor Law Amendment Act was passed, it was declared and acknowledged to be illegal to make those payments out of the poor-rate; and it was in consequence of the difficulties into which the coroner's office was thrown by those payments being withheld, that a provision was made in the Act of Victoria to provide for such payments out of the county-rate.

1431. Were any of the constables in receipt of fees even after the Poor Law Amendment Act came into operation, until the schedule of fees was prepared by the magistrates, in 1837?—Yes; and Mr. Tubbs, the constable of Islington, who has been examined before this Committee, was one of the examples of that description; he was in the habit of receiving 4*s.* until the schedule of the magistrates was prepared in 1837; and then he received, for giving information to the coroner, summoning the jury and witnesses, and attending at inquests, the sum of 7*s.* 6*d.*; by the amendment of the schedule he now does not receive a farthing; consequently, he has not only lost the 7*s.* 6*d.* which he received under the first schedule prepared by the magistrates, but he has lost the 4*s.* which he was in the habit of receiving previously.

1432. Have you acted strictly in accordance with the terms of the schedule which was prepared by the magistrates?—I have; I am not acquainted with having deviated from it in a single instance.

1433. Do you regard the "order" of the court of which you have spoken as a legal instrument, and as forming a part of the schedule?—I do not believe that, in point of law, it has any force at all; I could not regard an "order" of the court as a portion of the schedule; but, notwithstanding my belief that it had not law for its sanction, yet I have acted upon it in making the payments to the constables.

1434. Do you believe, if the Legislature had intended those "orders" of the court

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court were to be operative on the coroner, it would have been so expressed in the Act?—Undoubtedly; but the words of the Act are, “And the said justices shall cause a copy of such schedule to be deposited with the clerk of the peace of such county;” but there is not a word in the Act with reference to any “order” of the court.

1435. Do you regard the schedule as a more formal document than an “order,” and an instrument which could not be prepared without some previous notice and care in the inquiry?—Certainly; and it shows that it is that description of document that is intended, by the Act requiring that a copy should be sent to the coroner, and also another copy deposited with the clerk of the peace. An “order” of the court is a thing that might be made on the spur of the moment, and under excited feelings, and without due reflection; the preparation of a schedule would require more time and more consideration, and certainly must be deemed a document of more importance.

1436. Do you find the constables dissatisfied with the new arrangements?—I find them to be particularly dissatisfied; this Committee has had one of them here as a witness, who positively declined to act on the warrants of the coroner, in consequence of all payments having been withheld from him for his labour.

1437. Is the withholding the payment of 7s. 6d. on each inquest a serious loss to men in their circumstances?—Without doubt; it is a very serious sum for a man who is in the receipt of from 20s. to 30s. a week to lose, and especially when he has performed for that sum sometimes a laborious and onerous duty.

1438. Is it your opinion that the withholding a specific payment from the constables for the performance of such duties as they have to fulfil, is likely to be attended by any pernicious consequences to the public?—I cannot entertain a doubt on the subject; and it appears to me that the Legislature intended by passing the Act of Victoria, to provide for those special payments out of the county-rate.

1439. Is the duty of giving notice to the coroner of deaths which demand inquiry, one that can sometimes be easily avoided by the summoning officer?—Certainly, in a great number of instances. A constable may hear of a case in the course of ordinary conversation, which demands inquiry; it may not be communicated to him officially; he might apprehend that his neglect would not be discovered; consequently he might turn his ear aside from what he had heard, and might say, “As this case, if I summon a jury, may bring upon me a great many hours of labour, and a great deal of trouble, and as I should receive no payment whatever for the performance of my duty, I shall give no notice to the coroner, and make no further inquiry into the matter.”

1440. Then it is your opinion that some personal motive ought to be given to him for promoting rather than discouraging such investigations?—That is the opinion which I entertain; and I believe that the special payment for the special service would be conducive to vigilance and activity on the part of the summoning officer.

1441. Have you found a difference in the conduct of any of the constables since the payments have been withheld?—Certainly; and some cases have happened of which I had received no notice through the constables, but of which I believe I should have heard, in some of the instances at least, if the payments had continued. Some cases which I could mention to the Committee, have been of so striking a character, that I feel great difficulty in forming any other opinion; but if I were to describe the cases, it might involve parties in an unpleasant manner, and subject them to painful insinuations and reflections.

1442. Have you ascertained whether the constables of any other county in England, besides those of Middlesex, have been refused such payments?—On looking through the returns from the coroners, which have been presented to the House of Commons, I have not been enabled to discover a single instance in which the same provision exists with reference to the non-payment of constables as is now in force in this county. An analysis of those returns has been made by Mr. Baker; and if it be the wish of the Committee, I will hand it in for the purpose of having it printed in the Appendix.—[*Hands in the same.*]

1443. In that return which you have just put in, does it appear that any distinction is made in any of the counties between the unsalaried constable and the constable who being a beadle receives a salary in his last-named capacity?—I cannot discover, either in that analysis or in the returns which have been presented

sented to Parliament, that payments are withheld from any constable in any county except in Middlesex, on the ground of his receiving a salary as a beadle.

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1444. Are you of opinion that any detriment will arise to the utility of the coroner's office, as a protective power against crime, if some change be not made either in the law or in the schedule, so that the payments to the constables may be restored?—Certainly; I believe that an injury must arise to the utility of the office of coroner if such a change be not made. In all former times constables were paid for the special services which they performed on the holding of inquests; and the Act of Victoria appears to me to have been formed with the especial object of continuing those payments out of the county-rate instead of out of the poor-rate; and I believe that nothing can be more unwise or imprudent than to take from the summoning officer one of the strongest impulses for the discharge of his duty.

1445. What is the highest payment which is made to constables in any of the counties of England for the duties which they perform in the holding of inquests?—I think the highest payment for giving information and summoning the jury and witnesses, and attending at the inquest, independent of mileage, is 10s.

1446. Is the duty they have to perform on such occasions a severe one?—Sometimes it is exceedingly laborious and troublesome; and a constable living in one of the metropolitan parishes has often to travel many miles before he can procure the attendance of his witnesses.

1447. Is it attended with expense to him as well as trouble?—A constable, named Tiffin, of Pancras, informed me the other day, that in cab-hire alone it cost him between 3s. and 4s. at one inquest; and it often causes them expense, as they have informed me; sometimes constables, being beadles, have to hire and pay persons to perform the other duties for them, while they are in attendance in the coroner's court.

1448. Have you the power of paying the constable, or the assistant of the constable, if he should attend the inquest?—No, I have not; and under the "order" which has been issued by the magistrates, if it was an unsalaried constable who had been sworn in at the court-leet, I could not pay him, if there were a salaried constable in the parish.

1449. At the time the committee of magistrates was appointed to investigate the cause of the alleged increase of inquests in the county, had your average of inquests exceeded those of Mr. Stirling in the preceding year?—It had been less.

1450. What were the relative numbers which you had taken during the first year of holding your office, and the number taken by Mr. Stirling in his last year—that immediately preceding your appointment?—I have a Return here, which has been prepared by Mr. Wright, and which was produced on one of the days when Mr. Wright attended, but when no committee was formed. From the Tables which Mr. Wright has prepared, the result will be found as follows: Number of inquests taken by Thomas Stirling, Esq., from the 1st of January 1838 to the 31st of December 1838, 720; number of inquests taken by Thomas Wakley, Esq., from the 26th of February 1839 to the 25th of February 1840 (in each case both days inclusive), 690; besides 13 which were taken by Mr. Wakley in the house of correction, and in the prison where Mr. Stirling did not act as coroner.

*[The Witness handed in the same, which is as follows:]*



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INQUESTS taken by the late *Thomas Stirling*, Esq., one of the Coroners for the County of *Middlesex*, from the 1st of January 1838 to the 31st of December following, both Days inclusive.

TOTAL Number of Inquests.	Number of those Inquests taken in the House of Correction and New Prison.	Fees on Inquests.	Number of Miles.	Mileage.	Disbursements under the Act of 1 Victoria, cap. 68.	Average Amount of Disbursements on each Inquest.
		£. s. d.		£. s. d.	£. s. d.	s. d.
720	- - -	960 - -	3,149	118 1 9	705 - 5	19 7

TOTAL:

	£.	s.	d.
Fees - - -	960	-	-
Mileage - - -	118	1	9
Disbursements - - -	705	-	5
	£.1,783	2	2

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(B.)

INQUESTS taken by *Thomas Wakley*, Esq., one of the Coroners for the County of *Middlesex*, from the 26th of February 1839 to the 25th of February 1840, both Days inclusive.

TOTAL Number of Inquests.	Number of those Inquests taken in the House of Correction and New Prison.	Fees on Inquests.	Number of Miles.	Mileage.	Disbursements under the Act of 1 Victoria, cap. 68.	Average Amount of Disbursements on each Inquest.
		£. s. d.		£. s. d.	£. s. d.	s. d.
690	13	920 - -	2,902	108 16 6	655 9 5	19 -

TOTAL:

	£.	s.	d.
Fees - - -	920	-	-
Mileage - - -	108	16	6
Disbursements - - -	655	9	5
	£.1,684	5	11

1451. What were the amounts of the disbursements during those two years?—In the case of Mr. Stirling they amounted to 705*l.* 0*s.* 5*d.*; in the case of Mr. Wakley, to 655*l.* 9*s.* 5*d.* The amount of disbursements on each inquest was, in the case of Mr. Stirling, 19*s.* 7*d.*; in the case of Mr. Wakley, 19*s.*

1452. You have stated that the clerk whom you now employ was in Mr. Stirling's service for 15 years?—Yes.

1453. Did you direct him to make out your accounts precisely as he made out the accounts of Mr. Stirling?—I did. I desired him particularly to act for me precisely as he had done for Mr. Stirling, and I gave those directions in order to avoid grounds of complaint, understanding that Mr. Stirling's accounts had been perfectly satisfactory to the magistrates.

1454. Have any objections been made to your accounts?—Yes, several; objections have been made with reference to charges for mileage and others; and although my accounts were sent in, containing precisely the same charges as were made by Mr. Stirling for the preceding year, I have had the mortification of seeing

seeing it stated in the public papers, and in the printed accounts of the magistrates, that I had made overcharges for mileage.

1455. Can you charge a mile unless you travel the whole mile from your house?—No; that was one of the points of objection. It had been the invariable practice of the coroners to charge one mile on going to take an inquest, if it was only a quarter or half or three-quarters of a mile from their offices; but the opinion of the Attorney-general was taken on this important financial question, and he was of opinion that the 9*d.* could not be charged unless the coroner had gone the full mile. In point of law, I believe, the honourable law-officer of the Crown was perfectly correct, and I acceded at once to that new economical arrangement. Probably, the deduction arising from that alteration in my account for the whole year will not amount to 5*l.*

1456. Suppose you hire a hackney-coach or cab to convey you half a mile, would you have to pay the driver for the whole mile?—Certainly.

1457. If you travel in a post-chaise, are you charged a whole mile, although you go only a part of the mile?—Undoubtedly.

1458. Was any other objection raised with reference to the mileage?—Yes; the Act of the 25 Geo. II., c. 29, states, "That for every mile which the coroner shall be compelled to travel from the usual place of his abode to take an inquisition, the sum of 9*d.* shall be paid to him;" but it is now provided in conformity, I believe, with a case which was before the Court of Queen's Bench, and reported 5 Barnewall and Cresswell, page 430, that the mileage shall be charged from place to place; that is to say, if I go to Staines and take an inquest, I charge the mileage to that place; if I go from Staines to Uxbridge, I charge the mileage from Staines to Uxbridge, and so on, if I continue to take inquests until I return to my residence; and then that being the new starting point, I am to proceed again as before, charging from place to place.

1459. Was the subject of the mileage mooted in your presence before any of the committees of magistrates?—Yes, I believe it was before the committee of accounts, and also before the special committee; it was the subject of conversation with both committees.

1460. Did you, when you were before the committee, request that they would explain what the rule was with regard to mileage which they wished you to observe?—Yes; I made that request, because I was anxious to conform with the views of the magistrates, if I found they were not in direct opposition to law, and to send in accounts which should be altogether unobjectionable.

1461. Did one of the magistrates caution the committee against giving you any explanation on this head?—He did; on my making that request, one of the magistrates stepped from near the fire-place towards the table, and emphatically requested that his brother magistrates would not give any such explanation as was requested.

1462. When the rule with regard to the mileage was finally adopted by the court of quarter sessions, was any thing stated with reference to what might be the effect of it on the conduct of the coroners?—In a report in the "*Morning Herald*" of Friday, June the 5th, 1840, which I now hold in my hand, I find that the committee recommend that the mileage should be allowed for the actual distance travelled by the coroner, and noted in each case, from that officer's residence to the place of holding the inquest. The report having been received, one of the magistrates observed, that he hoped the court would look after the coroners, and not allow them to stultify the resolution of the committee by going the longest way round, and taking the most distant inquest first. The chairman said, if the coroner did so, it would be a fraud on the public; it was not to be expected the court would allow mileage, if the coroner chose to go round Edgeware in order to hold an inquest at Hendon. As the proposition of the magistrates with reference to mileage is, upon the whole, the most likely one to avoid disputes, and as I do not believe it is essentially an unfair one, I made no objection to it, but acceded to the proposition at once.

1463. Do you consider that such remarks or insinuations as those which you have quoted are calculated to injure the character of the coroner, and lessen his importance in public estimation?—I can entertain no other opinion; proceeding as they do from the magistracy of the county, sitting in quarter sessions, such remarks are calculated to inflict very great injury on the reputation of the coroner, and consequently on the utility of his office.

1464. Are you of opinion that the magistracy of the county are the proper persons

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persons to determine whether inquests have been "necessarily" or "unnecessarily" taken, and that they are the proper parties to audit the coroners' accounts?—I believe it to be impossible to find any body of persons in whom such a power, with reference to the necessity of holding inquests, could be more improperly vested. The passages which I have just quoted from the Herald newspaper, show also, that in the mere matter of auditing the accounts, the magistrates are not the best persons to whom such a duty could be intrusted.

1465. Would the exercise, on the part of the magistrates, of the power of determining whether an inquest has been necessarily or unnecessarily taken be injurious to the discharge of the duties of the office of coroner?—I believe that the exercise of such an authority would be fatal to the utility of the office of coroner, because such a control would subject that officer to such submission to the magistrates as would render his office in most instances of little benefit to the public; I believe it to be of the greatest importance that the coroner should be independent of the magistracy.

1466. Is the coroner required by law to hold inquests on the bodies of all persons dying in gaols, lunatic asylums and workhouses?—Not in all those cases; in gaols he invariably takes inquests on all prisoners who may die therein; in lunatic asylums and workhouses, he only takes the inquests on the bodies of persons who die under particular circumstances; probably it would be better for the cause of humanity and the ends of public justice, if inquests were taken on all persons who die in lunatic asylums, whether they be public or private institutions.

1467. As the magistrates are the controlling authorities in those institutions, is the conduct of the magistrates frequently brought under review in the coroner's court when inquests are held in gaols, lunatic asylums and workhouses?—Very frequently; and in some instances questions of very great importance are brought under the review of the coroner's court in connexion with the functions which the magistrates have been called on to exercise.

1468. In reference to the principle that judges should be independent, is not the independence of the coroner a mere delusion if the 120 justices forming quorums of "twos" and "threes," in finance and other committees, can determine whether inquests have been necessarily or unnecessarily taken?—Certainly; that is my opinion. It has been shown, that in this county the magistrates selected on one occasion 48 inquests, and sent those cases to the coroner for explanation; and in one instance they resolved to disallow the fees and the disbursements, thus taking on themselves to determine that the inquests had been unnecessarily taken. What remedy has a coroner against such an extraordinary exercise of power; if he apply to the Court of Queen's Bench for a *mandamus* to enforce the payment, although he should succeed in obtaining the amount of his account, yet he would be a considerable loser by the proceeding, consequently the tyranny which might thus be exercised over the coroner would be almost without check or control.

1469. If the magistrates exercise this power, might it not operate as a mode of punishment which is not to be found authorized in any Act of Parliament?—Clearly; the law has already provided for the punishment of the coroner in all cases of misconduct; he may be fined, indicted or removed from his office; and assuredly if he be guilty of misconduct, it is sufficient that he should be punished by the superior courts without subjecting him to that species of tyranny which might be exercised by the auditors of his accounts, in determining that inquests had been unnecessarily taken.

1470. Do you believe, that if you had neglected your duty, and not held inquests in some of the cases which you have named, that your accounts would have been passed without objection?—That belief is firmly impressed on my mind, because those cases were made the subject of complaint; it was evidently my duty, particularly in the cases of Austin and Coleman, to institute an inquiry; and if the inquests had not been held in those cases, I myself should have been liable to a fine for not having performed my duty.

1471. Is it your opinion that the coroner ought to be called upon to swear to the accuracy of his accounts under the Act of Victoria?—I can see no objection whatever to a coroner taking an oath that his accounts are correct; but I think it very objectionable to require a public officer to swear to the accuracy of his accounts, and then to enable individuals, who possibly may entertain a personal feeling against him, to adopt a course of examination in the presence of the public

public which might appear to indicate that the coroner's oath had not been deemed worthy of credit.

1472. Do you consider that the punishment which the coroner might be exposed to in the superior courts would be sufficient to restrain him within the bounds of his duty?—I believe that the provisions of the law are amply sufficient for that purpose.

1473. Is the judge or the presiding officer of any court in the kingdom exposed to such an audit of his accounts, or to such a control of his discretion in the exercise of his authority, as has lately been attempted to be imposed on the coroner of the county of Middlesex?—Not that I can discover.

1474. Was any complaint made against your accounts in consequence of your having taken any inquest by deputy?—Yes.

1475. Was that complaint made before or after the inquests on Austin and Coleman were taken?—At least three months after.

1476. When were the inquests taken which were objected to in the accounts?—At the end of September or the beginning of October 1839.

1477. Then the objections relating to the deputy were not made until February in the present year, the previous complaints and the appointment of a committee having taken place in the autumn of 1839?—The periods are stated correctly in the question; the complaint respecting the taking inquests by deputy was made, I believe, in the month of February; those inquests had been held by Mr. Bell for me between the 29th of December 1839 and the 10th or 11th of June 1840, during 12 successive days; at that time I was confined to my room by illness, and could not leave the house until the 11th day; I then went out to hold two inquests, but suffered so much pain, that Mr. Bell took other inquests for me in the afternoon, and two or three on the following day, which was a Saturday; but on the succeeding Monday I resumed my duties.

1478. With the exception of the inquests you have named, did Mr. Bell or any other person at any other time hold inquests as deputy for you?—Upon no other occasion; I believe I have already stated he held two inquests for me before one jury in August or September, at a time when I was out of town; but, with the exception of that occasion, and during the illness to which I have just referred, he did not take a single inquest for me, either before or since.

1479. Were the whole of the charges in those cases, including fees, mileage and expenses to witnesses and other persons, paid out of your own pocket, struck out of the account?—Yes, the whole sum was struck out of the account, amounting to 40*l.* 9*s.*; on attending before the committee, the magistrates informed me that they had ascertained that nine inquests had been taken by deputy; they asked me if that information was correct; I instantly stated that it was not nine, but 20, which had been taken by deputy; and I then informed them under what circumstances Mr. Bell had acted for me during my confinement to my residence.

1480. Are you certain that you received no previous intimation that the magistrates considered that it was illegal to take inquests by deputy, with a request that such charges might not again appear in the accounts, or they would be disallowed?—I received no intimation from them whatever of the kind; the first notice I received was an order from the court, stating that the coroner's accounts had been referred back to the committee, with instructions that they should ascertain "how many inquests had been taken by deputy, and to disallow the same."

1481. Was any proceeding adopted at the same time with reference to the inquests which had been taken by deputy for the coroner of the Duchy of Lancaster?—Yes, his accounts were also referred back to the committee; but in the case of the coroner for the Duchy of Lancaster, although the court of quarter sessions had determined by resolution that he had not the right to appoint a deputy, the committee re-opened that inquiry, and reported to the court in favour of paying the sums which had been charged by him for the inquests which had been taken by deputy; this was at the same time that the committee reported against the like charges which had been made by me for the inquests taken by deputy; the general court afterwards adopted both recommendations; the inquests which I had taken by deputy were altogether disallowed; the inquests which had been taken by deputy by the coroner for the Duchy of Lancaster were paid in full.

1482. Did the disallowance, in your case, extend to the money which you had paid out of pocket?—Yes, it did.

1483. Do the Committee understand you to say that those inquests were taken  
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by deputy on 12 successive days, and that you could not leave your house on that occasion in consequence of illness?—Such were the facts.

1484. Can you account for the difference of conduct that was observed towards you, as compared with what was observed towards your predecessors in office?—I cannot; the proceedings were to me altogether inexplicable.

1485. Have any coroners the power to appoint deputies?—Yes; the coroners for particular liberties and franchises have that power, and so have the coroners of boroughs, under the 6th and 7th of William IV.

1486. Is it your opinion that similar powers should be possessed by coroners for counties?—Yes, certainly; I cannot conceive why such a power should be exercised by a coroner acting in a very small locality, and be withheld from a coroner who acts throughout the greatest part of a large county.

1487. Do you think the possession of such powers by coroners for counties would operate disadvantageously to the public?—On the contrary, I believe they would be attended with considerable advantage to the public, and certainly would be productive of very great convenience to jurymen.

1488. Would you make the coroner responsible for the acts of the deputy coroner in all respects?—Yes, in all respects, while acting for his superior in office. That is the law with reference to sheriffs and under-sheriffs, and I believe that it works extremely well. If the whole of the responsibility connected with the exercise of the coroner's functions remain with the coroner himself, although he has appointed a deputy to act for him in particular cases, it would make the coroner extremely careful as to the person whom he selected for the performance of such duties.

1489. Would you not rather recommend the appointment of an additional number of coroners than the appointment of deputies?—No; I think by increasing the number of coroners you would lessen the value and importance of the office, and be more likely to obtain incompetent or incapable officers.

1490. Are the reasons for appointing deputy coroners in counties more urgent than those for allowing deputies in boroughs, and particular liberties and franchises?—There can be no doubt of it.

1491. Are you acquainted with any disadvantages that would arise from giving to county coroners the power of appointing deputies?—Not one; and I believe that the exercise of such a power would operate very advantageously to the public service.

1492. Are you firmly of opinion that magistrates are not the proper persons to determine what inquests ought or ought not to be held by the coroner?—After having devoted a great deal of attention to this subject, I have come to the conclusion that it would be as well to abolish the office of coroner, as to allow magistrates to exercise any such power. The justices of the peace are the controlling authorities in the gaols and in lunatic asylums; they are sometimes concerned in cases where life is lost in conflicts between the people and the civil powers; the magistrates are the persons to whom the poor apply in cases of urgent necessity, when the requisite aid is refused to them by parochial officers; in the whole of those cases the coroners may be brought into conflict with the magistrates in the discharge of the most solemn and important portions of their public duties. If coroners be subject to the control of persons who are thus engaged, seeing the tyranny which might be exercised over them with reference to their accounts, they might shrink from the performance of their duty at a time when their most powerful energies should be called into action in the public service; and I do not believe that the magistrates themselves, when they reflect on the subject, and on its vast importance, can desire to possess or exercise a power which might constantly lay them open to imputations of an unpleasant and disagreeable character. I could mention a case which occurred not long since in a workhouse very near London; a poor man was sent to a distance to his parish; when he arrived there it was too late to have him received; he was again brought back, and he died almost immediately after his admission into the house; in that case, the parties who directed the removal of the pauper were three magistrates, who were *ex-officio* guardians; on the death of the man, they were the persons who determined no inquest should be held; that, in fact, the coroner should not receive notice of the death.

1493. Would you recommend any alteration in the law with reference to the auditing of the accounts of the coroners?—Yes; I certainly should recommend

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an alteration to be made, and I consider that it is most desirable, not only for the coroners, but the magistrates themselves.

1494. What officer of the county would you suggest should act as auditor of the coroners' accounts?—The office of coroner is a very peculiar one; the coroner in fact stands between all persons in authority and the people, it being his duty to inquire into the cause of death, for the purpose of preserving human life; it is not therefore an easy thing to suggest a person on whom the duty should devolve; but, probably, as the clerk of the peace is appointed by the lord-lieutenant of the county, he might be a proper officer under certain regulations to perform the duty of auditing the coroners' accounts.

1495. Would you require the coroners to swear to their accounts?—I do not see any objection to that practice; the sheriffs of counties swear to the accuracy of their accounts; and treasurers of counties conform to the same regulation.

1496. Would the accounts, besides being attested on oath, be accompanied by the requisite vouchers, including the receipts given by the parties to whom payments had been made?—Certainly; there would be the receipts from all persons who were paid at the inquest, and the vouchers for the coroner's fee would be furnished in the signatures of the jurymen, attached to the inquisition. There is no privacy in the proceeding; if there was an inaccuracy of any kind, it could be easily ascertained on inquiry.

1497. Accompanied by such a change in the mode of auditing the accounts, would you recommend any alteration of the law as to the discretion of coroners, relative to the necessity of taking inquests?—A declaration of the law on the subject might be extremely useful, and prevent angry discussion and useless and expensive litigation.

1498. Do you believe, as the law now stands, that the judges would determine that the magistrates had the power of deciding whether inquests had been necessarily or unnecessarily taken?—As the question has never been distinctly raised, and only arose incidentally in the case reported in *East*, I have no decided opinion upon the subject, although I am inclined to believe that the judges would not put the construction which has been placed upon the words "duly taken," in the Act of George the Second; and I cannot understand how the word "duly" can be considered to be synonymous with the word "necessarily."

1499. Do you make any other charges in your account besides charges for fees, mileage and disbursements, described under the heads mentioned in the schedule?—Not any.

1500. Are you allowed any sum for stationery, or for the parchments on which the inquisitions are drawn?—No; the county supplies the printed summonses for the jurymen and the witnesses, but no other paper or document.

1501. Are you allowed any rent for an office?—No.

1502. Is there any allowance or salary for the clerk, whom you employ on the business of the coroner's office?—Not any from the county.

1503. Do you bind over witnesses and prosecutors on parchments?—Yes.

1504. Are you allowed in your accounts any sum to cover the cost of these things?—Not any sum.

1505. Do you consider that the justices of the peace are the fittest persons to prepare the schedule in which is made the allowance which shall be paid to constables and to the proprietors of rooms wherein inquests are held, and to witnesses?—Certainly not; but I think they might render assistance, from their knowledge of the county, to any party who had the arrangement of such a schedule.

1506. Would an appeal to the judges for confirmation of the arrangements of the magistrates with regard to the fees and the allowances, be a useful aid or check to the suggestions of the magistrates?—Yes, and I believe that such a reference would be attended with considerable advantages, and in all instances with perfect satisfaction to every interested party.

*Martis, 14<sup>o</sup> die Julii, 1840.*

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MEMBERS PRESENT :

Mr. Williams.  
Mr. Gally Knight.  
Lord Eliot.

Colonel Wood.  
Mr. Wakley.

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LORD TEIGNMOUTH IN THE CHAIR.

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*Thomas Wakley, Esq., a Member of the Committee, further Examined.*

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*M.P.*

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1507. *Chairman.*] YOU have adverted to the proceedings of the magistrates at Uxbridge, in reference to an inquest that occurred at Hayes, and you have stated that the proceedings of the coroner afterwards, in committing a party at the inquest at Harefield, notwithstanding the jury had returned a verdict of wilful murder, was severely censured, and the conduct of the constable, in not bringing back the prisoner, also subjected him to a strong rebuke; do you think that the magistrates had any power to pass this censure upon your conduct?—I certainly consider that the magistrates had an undoubted right to express the opinions they did express upon those occasions; whether it was discreet to do so or not is another question.

1508. Then, you have no particular complaint to make against the magistrates, on account of their having deviated from the discharge of their rightful duty in the case?—Certainly not; I believe that the duty they did discharge was a strictly legal one, and that there was no violation of their power in any respect, supposing that the condemnation of the practice of the coroners was discreetly made.

1509. This duty is perfectly distinct from that which a magistrate might exercise after an inquest, in determining whether that inquest was duly or necessarily held?—Quite so; because the duties which the magistrates had to exercise upon that occasion were entirely unconnected with any proceeding, so far as I am aware, which afterwards took place at the Sessions House, at Clerkenwell; I may state, that I believe the magistrates who were concerned in the cases at Harefield and at Hayes were in no way connected with the auditing of the accounts, or with any of the proceedings that transpired at the quarter-sessions.

1510. You have complained in the course of your evidence of the magistrates having exercised a power, which you do not conceive belongs to them, of enforcing your attendance upon the occasion of their inquiring into the question, whether the inquests had been duly or necessarily held; how could the magistrates carry on their inquiry without your presence, inasmuch as they have no power of summoning witnesses upon the occasion?—There is a great distinction to be drawn in the cases which come before the magistrates for their consideration with respect to coroners; and unless those distinctions are borne in mind, much confusion may arise with reference to the facts of the whole case. Under the Act of Victoria, the magistrates have undoubtedly the power of requiring the coroner to attend before them, and to submit him to an examination upon oath with reference to the accuracy of the account of his disbursements; but I contend that, beyond examining him with reference to the matter of the disbursements, they have no power to call him before them on any occasion, or to submit him to any examination.

1511. Then how can they exercise the power of ascertaining whether an inquest has been duly held, waiving the question of the interpretation of the term "duly"?—If the magistrates could exercise the power of determining whether an inquest was necessarily or unnecessarily taken, doubtless, as an act of justice to the coroner before they decided, they would request his attendance before them, and in such a case the coroner himself, as an act of prudence on his part, would feel the propriety of endeavouring to sustain the charge that he had made, and attend before the magistrates for the purpose of making the necessary defence; but I do contend that the magistrates have not the power of determining whether

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an inquest is necessary or not, their power being strictly confined to determining whether an inquest has been duly taken.

1512. Admitting the distinction between "duly" and "necessarily," would it not be impossible for the magistrates to come to a decision upon that question without inviting, or, if necessary, requiring, the attendance of the coroner?—They might have it in their power to determine without the coroner's presence, because there might be informalities on the face of the inquisition; the inquisition itself might show that it had not been signed by the requisite number of jurymen; that the date when the inquest was held was not correctly inserted; that the place where the inquisition was taken was not correctly described: all those things, upon the mere face of the inquisition, might show that the inquest had not been "duly" taken.

1513. Still, supposing the inquiry could not be completed without the presence of the coroner, would they not be fully justified in summoning the coroner; and how could they discharge their duty without doing so?—They have no power by law to summon the coroner for the purpose of requiring from him any answers in such an investigation.

1514. Then you conceive that their proceeding in enforcing your attendance on the occasion to which you have alluded, notwithstanding the powers vested in them of inquiring whether the inquisition was duly or unduly held, was illegal?—They did not enforce my attendance, they merely requested by a note to the clerk that I would attend, and I did so, without objection or hesitation, when it was merely before the Committee, having protested against their power to enforce my attendance, or to compel me to submit to an examination upon the questions which were about to be proposed to me; but I answered every question which was submitted to me, without hesitation.

1515. Do you conceive that the magistrates have no power of determining whether an inquest has been necessarily or unnecessarily held, by the statute of George the Second?—That is my positive opinion, after having devoted a vast deal of attention to the subject; I find nothing in that statute which, even by implication, can, in my opinion, be considered to confer on the magistrates any such authority.

1516. Then you think the term "duly" applies solely to the formality or informality of the proceedings?—That is my opinion, and not to determining whether the coroner has exercised a sound discretion in instituting the inquiry.

1517. Then how do you get over the judgment of the judges in the case in East, which has been so frequently alluded to?—The opinion given by the judge in that case was an extra-judicial one. It is clear, with reference to the facts of that case, that the inquisition had not been duly taken, for the coroner had gone into a village to hold an inquest on the body of another person, and in which case the jury had been duly summoned; but he was informed when he got into the village, that another person had just then dropped down dead suddenly in a shop, and he almost as suddenly held the inquiry. It assuredly could not be considered that such an inquest was duly taken, for if the party had lost his life by having had poison administered to him, there was not sufficient time for making the due inquiries before the inquisition was held.

1518. The judge in that case stated, that the power of coroners holding inquisitions might be greatly abused. If you deny to the magistrates the power of preventing that abuse, do you conceive that a sufficient remedy is already otherwise provided at law?—Certainly; and there had been found sufficient remedies during the hundreds of years that the coroner's office had been in existence, up to the time of the occurrence of that case; and I do not recollect that the judge stated, that the coroner's office might be abused if the magistrates had the authority which you have stated. With reference to that subject, I would quote a passage from the judgment which was given by Lord Tenterden in the case of Garnett and Farrand, reported in *Barnewall and Cresswell*, K. B., vol. vi. p. 625. The remarks of the judge in that case immediately bear on the independence of judges in the exercise of their judicial functions. He said, "This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public and for the advancement of justice; that being free from action they may be free of thought and independent in judgment, as all who are to administer justice ought to be; and it is not to be supposed beforehand that those who are selected for the administration of justice will make an ill use of the authority vested in them. Even inferior justices, and those not of record, cannot be called in question for an error in judgment, so long

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as they act within the bounds of their jurisdiction. In the imperfection of human nature, it is better even that an individual should occasionally suffer a wrong, than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it." I cannot conceive that any judicial remarks could be more strictly applicable to any case than are these to the question which has now been agitated between coroners and magistrates; because if the magistrates can, after an inquest has been held, and after a certain expense has been incurred, sometimes the coroner paying 4*l.* or 5*l.* out of his own pocket, determine that that inquest has been unnecessarily taken, and set the whole aside at once, without having the inquisition previously brought before the superior court and quashed, then the discretion of holding inquests would be vested in the magistrates and not in the coroner, and the coroner's independence would be entirely at an end.

1519. What is the remedy provided by law in the event of the coroner holding an inquest unnecessarily?—He would be liable to an indictment for a misdemeanor, to a fine, to imprisonment, and to removal from his office.

1520. It appears that you have been called in question with regard to several of your inquests, but that, in fact, the fees upon your inquests have been ultimately disallowed in no one instance; do you think you have been fettered in the discharge of your duty by the apprehension even of an unreasonable interposition on the part of the magistrates?—I have been perplexed and greatly annoyed, but I cannot say I have been fettered, or that I have been prevented from holding a single inquest where I deemed an inquiry necessary.

1521. Do you think that the magistrates as a body would ultimately sanction any proceeding of any individual magistrate, or of any quorum of the committee of magistrates, who might unduly interfere with the coroner's discharge of his duties?—If the whole body of magistrates were to attend and take part in the proceedings, I cannot believe that their decision ultimately would be unjust.

1522. Is not the attendance at the Court-house, Clerkenwell, sufficiently numerous to afford an effectual guarantee against the sanctioning of any partial abuse of this discretionary power?—I think not; and, unfortunately, it has appeared from the evidence which has been given before this Committee, that the proceedings often originated with two or three magistrates in the committee of accounts. It appears that three of the magistrates form a quorum; and I found, upon examining the accounts and the minutes which have been submitted to this Committee, that on two or three occasions the magistrates who had decided against me were gentlemen with whom I had previously been in some kind of personal conflict.

1523. The question applied not to the quarter in which the proceeding may have originated, but the final revision of the general court of magistrates. Can you state that in any one instance your jurisdiction has been interfered with by the general body of magistrates, or that when there has been a disposition to interference on the part of any individual or committee, that interference has not been condemned, and the proceeding disannulled by the general court of magistrates?—On the 11th of October, in the last autumn, charges were made against me at the court of quarter sessions, of having taken unnecessary inquests. At the same time it was ultimately proved, upon inquiry, that not one unnecessary inquest had been instituted. At the same time Mr. Laurie, one of the magistrates, moved in the court that my accounts should be referred back to the finance committee, in consequence of their not being accompanied with sufficient vouchers. That motion was carried by the unanimous decision of the court; and yet I was never asked afterwards for any additional vouchers, and not a single voucher was wanting for any item in that account.

1524. But ultimately that charge and that examination and reference to the committee led to nothing more than that the fees were ultimately allowed by the general court?—Yes, it may have led to a great deal more, to the injury of the character of the coroner throughout the county, and to the diminution of the utility of his office; because it is impossible that such statements can be made by such a body as the magistrates of this county without having injurious effects both on the one and on the other.

1525. My question applied to fact and not to hypothesis; it was whether the fees had not been uniformly allowed, and not as to any prejudice that might have been excited against you by the proceedings?—Without doubt the fees were afterwards

afterwards all allowed, because it was found that they could not be legally refused; but the public know nothing of what passes privately in the finance committee, and the public accusations, and the accusations which were made at the quarter sessions remain upon the character of the accused individual without any mitigation or palliation.

1526. You have alluded in your former examinations to a report which appeared in the "Morning Herald" of a proceeding before the general court of magistrates; you have also stated now that a prejudice might have been excited against you by the general court of magistrates; can you distinctly state that you believe that your character has been in the slightest degree injured, or your authority as coroner in the slightest degree impaired, by any such proceeding?—I believe that now I have set myself completely right with the public in all these matters, but it has been a work of great anxiety for me to accomplish that object. I believe that my character was most seriously injured, and the utility of my office and the powers of my office lessened and weakened by what had passed at the general court of quarter sessions.

1527. That is your impression; but you cannot state it as a fact?—I can state my impression to be a fact; and that is my impression, undoubtedly; I never entertained one more positively or more firmly.

1528. Do you think that if there was a disposition on the part of the general body of magistrates, supposing it possible, to interfere unduly with the coroner's exercise of his functions, that that court, acting before the public, and their proceedings being known to the public, would be borne out in such a system of interference by public opinion?—No; I believe public opinion would be against the magistrates, and that ultimately they would yield to its influence; but it is impossible to predicate what a body of men would do when no particular person in that body was under any legal responsibility for his actions. I may state here, with reference to the influence of public opinion, that Mr. Laurie, one of the magistrates, has stated before this Committee, that he was induced to take up the inquiry in October last, in consequence of the statements which he found in the newspapers, and afterwards it was discovered upon examination that all those statements were incorrect; for that the inquests which I had taken had been less than those of my predecessor in office, and that the expense to the county was also less.

1529. Do you not think that the power of the press would have been directed against any body of magistrates who interfered unduly with the solemn exercise of the discharge of the duty of coroner?—That would be dependent in a great measure on the politics of the coroner and the politics of the press; because, unfortunately, in all these matters political considerations are uniformly introduced. Hence, in my proceedings, although I endeavoured to conduct the business of the coroner's office as usefully as possible for the public, yet, in the press, which was politically opposed to me, I had little less than calumnies and slanders in return for my exertions.

1530. Yet, notwithstanding all the political feeling against you, and the imputations against your character and conduct as a coroner, and notwithstanding the disposition on the part of some of the magistrates unduly to interfere with your proceedings, you have, within the period during which you have exercised the office of coroner, completely triumphed over all the opposition and all the imputations you have had to encounter?—The Committee must determine upon the facts which come before them. I certainly feel, myself, that I am not at all injured or weakened by the conflict. With reference to political opposition, I am bound to state, that amongst the magistrates, those gentlemen whose politics are the most decidedly opposed to my own, acted with reference to my fees in the most honourable and high-minded manner; and I might certainly instance the conduct of Mr. Serjeant Adams and Mr. Pownall as examples to which I would more particularly refer.

1531. You have stated your opinion, that you consider the magistrates not a fit body to be entrusted with the auditing of your accounts as coroner; you have alluded, especially, to the case of your holding inquests in lunatic asylums and gaols; and you have expressed that opinion on the ground that the magistrates being appointed visiting justices of those gaols, those very parties whose conduct might become the subject of investigation might be the very parties to audit your accounts; is that your opinion?—Certainly; and I might mention cases which prove, very clearly, that functions should not be exercised by persons in authority, which

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are likely to bring those persons into unseemly conflicts before the public. I certainly had reason to believe that the accusations which were first made against me at the Sessions House arose out of a conflict which I had had with a magistrate at Hendon, in holding an inquest in that parish, on the body of Thomas Austin, when the magistrate himself, although the party had met with his death by falling into a copper of boiling water, did not consider that an inquest was necessary. I might also mention other cases as examples. A case occurred to the westward of London. I received information that a man, in an exceedingly ill state of health, almost dying, had been removed from the workhouse in a cart, that he might be taken to the place of his legal settlement. When the cart arrived at the place, the required officers could not be found, and he was taken back to the workhouse; and it was reported to me that he had died in the cart before returning; but the governor of the workhouse informed me, that he did not die until nearly an hour after he had returned. In that case, the person so removed had been taken away by the direction of three magistrates, who were the *ex-officio* guardians of the union. The body was buried, and I received no information of the facts of the case until the interment had been made. Having inquired into the case, and as the body had been buried at Paddington, away from the spot where the transaction happened, I did not consider it necessary to have the body disinterred; but had I done so, it might have given offence to the magistrates who directed the removal of the man in the first instance, and then ordered that no notice of the death should be sent to the coroner; and if they had been evil-disposed magistrates, they might have afterwards attended at the Sessions House, and, in auditing my accounts, might have selected 20 or 30 inquests, as having been unnecessarily taken. This is a kind of inquisitorial tyranny which it is impossible can be imposed on any judge without its having the most pernicious effect upon his conduct. I would also mention, that in the gaols the visiting justices might take offence at the manner in which my inquiries are conducted, and I might receive no other evidence of my having offended them than that of the accusations which might be brought against me at the Sessions House, and in the presence of the public. Again; in holding inquests in a lunatic asylum, on one occasion, when Mr. Pownall was present, it was ascertained that an insane pauper had been sent from one of the workhouses in the county severely marked and bruised; and there the magistrates who had made out the order for his committal to the asylum had not previously seen the pauper, as is required by the Act of Parliament. In the performance of my duty upon that occasion, I might have given great offence to those magistrates whose neglect was thus brought under view. The same thing might often occur in gaols and other places.

1532. Are you not aware, that in all the cases you have referred to of inquests held, whether in gaols, or lunatic asylums, or workhouses, as in the case at Hendon, the accounts of such inquests came under the revision of a committee of magistrates specially appointed for the purpose?—Nothing of the kind occurs. In the ordinary routine, the coroners' accounts are sent to the sessions, and those accounts go before the committee of accounts, where they are merely audited; at least such has always been the practice until lately. There has never been, as the minutes which have been read before this Committee show, a special committee appointed to inquire into the inquests which the coroners have taken, excepting on one occasion.

1533. My question referred to the appointment of a distinct financial committee, to which the accounts of the coroner were referred; is there not a distinct financial committee appointed of the magistrates?—In the ordinary course of business, the accounts go before the committee of finance, but not before a committee specially appointed for the purpose of inquiring into those accounts; in fact, the committee of finance is an open committee of all the magistrates; and any three of the magistrates who happen to be first in attendance, form a quorum, and can proceed to business.

1534. The committee of which you speak, and which is the committee to which I allude, sends its report to the general body of magistrates, and that general body has the power of allowing or sanctioning, or not, the reports of such committee?—Certainly; that is the practice of the committee of accounts; all their reports go before the general body of magistrates, but there certainly is no distinct special finance committee with reference to the coroners' accounts.

1535. Then, inasmuch as all the accounts of all the inquests that you have held must have come ultimately before the general court of magistrates, and you have no reason whatever to complain of the decision of the general court, where  
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has any injury resulted to you, or any disparagement of your office, from any proceedings in any of the different departments to which you have referred?—The general court in the first instance confirmed, I believe, all the reports and recommendations of the several committees. The general court, after 40 years' practice to the contrary, resolved that the whole of the sum which I had charged for taking inquests by deputy, including fees and disbursements, should be struck out from the accounts, and that deduction has been permanently made. The general court, in conformity with the recommendation of the committee, that the fees and disbursements in the case of Coleman should be disallowed, resolved, that my accounts should be referred back to the finance committee from the want of vouchers. The general court confirmed the recommendation of the special committee, that all payments in this county should be withheld from the constables who are in the receipt of regular salaries or wages. Thus, I consider, whatever may have been the decision of the general court lately, that I have great reason to complain of the manner in which the general court previously treated my conduct.

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1536. Reserving the question of deputyship, and also the schedule of fees for subsequent investigation, you have no reason to complain of your fees and disbursements having been disallowed in regard to any one inquest that has been held?—I have reason to complain that they were ever disallowed at all; I certainly regret that it should have been deemed a case for disallowance, or discussion, because as the death was evidently one that had occurred from accident, I consider I was bound by law to hold the inquest, and I thought it showed great ignorance of the law on the part of the magistrates that they should at all question the propriety of such an investigation.

1537. With regard to the schedule of fees, you approved of the first schedule; you complained of the alterations made in the second schedule, and you considered that the "order" issued subsequent to the second schedule was not legal, inasmuch as it did not form part of the schedule; was a copy of that "order" sent to you?—Yes, five weeks after it had been adopted by the court.

1538. Was a copy of it deposited with the clerk of the peace?—That I cannot say; I never made inquiry.

1539. Then, supposing it were, would there be any informality in regard to the issuing of that "order"?—Certainly; because I cannot consider the "order" of the court to be a compliance with the provisions of the Act of Parliament; the Act distinctly states, "that the magistrates shall prepare a schedule, and that they may alter the schedule from time to time;" there is no mention made of any "order" of the court, and consequently I cannot conceive how a mere "order of court" can form part of the schedule; in order that it should form part of the schedule, the provisions of that "order" must necessarily be embodied in the schedule.

1540. Do you not think that that "order" was a mere variation of the schedule; and that, provided it was accompanied with the formalities prescribed by the statute to which you have alluded, it must be considered altogether as being a part of that schedule?—It was, without doubt, intended as a variation of the schedule; but inasmuch as it has not been introduced into the schedule, I cannot see how it can form part of that document.

1541. By the 1st of Victoria, the expense of inquests was charged on the county-rate?—Precisely so; it was stated in the preamble and the first enacting clause, that the magistrates should make a schedule of the fees, allowances, and disbursements which might be lawfully paid by the coroner holding inquests upon any dead bodies.

1542. Do you think that the magistrates, by their amended schedule, in which they prohibited payment to any officers receiving salaries in the parishes, acted illegally, inasmuch as their proceeding implied that the payment of the expenses of inquests was still recognized as chargeable on the poor-rate?—It certainly is my conviction that they have not acted legally in continuing the payment from the poor-rate; because the constables are paid or they are not paid; if they are paid and do not receive the payment from the county-rate, but from the poor-rate, that practice is illegal, and is in contravention of the terms, and evidently of the intention, of the Legislature in framing the 1st of Victoria; if they are not paid, then there is also a contravention of the law; because the Act of Victoria states in its preamble, that it was framed for the express purpose of providing for all those payments which had been usually made at the holding of coroners' inquests.

1543. Are not the metropolitan police constables paid out of the poor-rate,

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and would not the recognition of such payment on the part of the magistrates be equally illegal as in the case of the recognition of payment of constables' salaries directed by the parish?—They are paid out of a fund which is created by a police-rate formed by an assessment upon the poor-rate.

1544. Then that is equivalent to a poor-rate?—I think not; the fund owes its source to a distinct origin, and where there are no police there is no such fund.

1545. Still it is charged upon the parish?—It is charged upon the parish, without doubt.

1546. You still make a distinction between the salary of the parochial constable and the wages of the police constable, in reference to the quarter from whence the fund is derived?—Certainly; I consider the distinction is as easily perceptible as possible.

1547. Then you think the magistrates were strictly legal in prohibiting the payment of the police constables, but that they acted illegally in refusing payment to the regular salaried parochial constables?—No; I do not consider that the magistrates have acted in conformity with the provisions of the Act of Victoria, in withholding payment from police constables, whether or not they were in the receipt of wages as beaules; because I believe it was the intention of the Legislature that inasmuch as the constables, in giving notice to coroners, and in summoning jurors and witnesses at inquests, had distinct and specific duties to discharge, and duties which ought not on any account to be neglected, payment should be provided for them for the performance of those specific duties.

1548. You have adverted to the hardship inflicted on the constables in being subjected to expenses without remuneration on account of inquests, and to the consequent discouragement in the discharge of their duties; can you take on yourself to say, from your own experience, that the constables have in consequence neglected their duty?—I state most distinctly that it is my decided impression that in some instances notices of inquests have not been forwarded to the coroner which he would have received if the payment had been continued.

1549. Do you think that in cases in which all the parties in a house are interested in preventing the disclosure of a death, any remuneration afforded to the constable would enable him to discover the fact, and give notice to the coroner?—There cannot be a doubt that the remuneration which was provided by the first schedule, in conformity with the Act of Victoria, was calculated to act as a small stimulus to the constable to perform his duty on such an occasion; and the manner in which the withdrawal of the payment influences the constable, is well exemplified by the fact, that one constable who has been before this Committee altogether refused to act on the warrant of the coroner, in consequence of such payment being withheld.

1550. Still there are cases such as I have alluded to, which would escape altogether the vigilance of the most attentive constable?—No doubt of it; and such cases, I am of opinion, are rather numerous.

1551. You have stated that the magistrates objected to your holding inquests by deputy, and disallowed the fees upon such inquests; and you, at the same time, stated that Mr. Higgs was allowed to continue to discharge his duty by deputy. Are you not aware that in the case of Mr. Higgs the magistrates had no control whatever over him, inasmuch as he was allowed to appoint a deputy by letters-patent?—The court of quarter sessions resolved, after examining the patent of Mr. Higgs, that he had not a right to take inquests by deputy, and consequently his accounts, with my own, were referred back to the committee of accounts, with a special instruction to that committee, to the effect that they were to inquire into "how many inquests had been taken by deputy in the accounts of both of the coroners, and to disallow the same."

1552. But did the magistrates afterwards discover that they had been in error, in supposing they had any control over Mr. Higgs, with regard to the deputyship?—I am not aware that any such discovery was made; but on the accounts coming before the committee, instead of attending to the order of reference the committee instituted an inquiry as to the supposed right of Mr. Higgs to hold inquests by deputy, and then recommended the payment of his account; but in my case they decided upon disallowing the sums which were charged as fees and disbursements, in consequence of such inquests having been held by deputy.

1553. Is it not a fact that the magistrates considered those letters-patent as giving Mr. Higgs an authority that they could not control?—I am not aware that they held any such opinion.

1554. You



1554. You are aware that, excepting in cases of particular franchises, for coroners to hold inquests by deputy is illegal?—It certainly is not legal for coroners to hold inquests by deputy in counties; I was not fully acquainted with that fact until after the question was mooted at the sessions, and no inquests were taken by deputy for me, excepting during the 12 days' illness which I have already mentioned, and upon one occasion in August or September, when Mr. Bell held two inquests before one jury.

1555. In reference to the proposal for a third coroner, are you not aware that it has been the practice in other counties, besides that of Middlesex, to appoint additional coroners, where there has been an increase of inquests?—I believe it has only been done in one or two instances in this country, and in the present Session of Parliament a Bill has been passed to increase the number of coroners in the county of Chester.

1556. It appears that the attention of the magistrates was originally called to the subject of the coronership by the increase of inquests which had taken place in the county of Middlesex; do you not think the proposal for a third coroner, and also the inquiry with regard to the deputyship, and the other inquiries which have been made, originated in a necessity which seemed to be impressed on the minds of the magistrates of going into a thorough investigation of the whole of so important a subject?—I cannot say that I entertain any such opinion, because there was no complaint of the increase of inquests, or that any unnecessary inquests had been taken, until I became coroner, and it was very curious that such complaints should arise then, when I had less inquests than my predecessor, and put the county to less expense.

1557. But the increase of inquests has been for some years, on the whole, progressing?—They had been progressive up to the end of 1839, until I became coroner.

1558. Lord *Eliot*.] To what cause do you ascribe the decrease in the number of inquests held by you as compared with those held by your predecessor?—The decrease was very small, but it is a fact, as the minutes show, that I had taken less than my predecessor; probably it was in consequence of the instructions which I had issued, requiring the constables to make more particular inquiries than they had instituted previously, and consequently rendering the applications for warrants somewhat less frequent.

1559. Mr. *Gally Knight*.] Do you think that politics have had any thing to do with the differences between you and the Middlesex magistrates?—With particular individuals political feeling may have exercised some slight influence, but I rather ascribe the difficulties which have taken place to the conflicts that have arisen out of the exercise of authority by the coroner and the magistrates.

1560. Do you think it desirable that a person who is known to have been a strong political partisan should fill the office of coroner?—I cannot conceive that it is more objectionable for a person who has entertained such opinions to fill the office of coroner than it is for the Lord Chancellor to fill his particular office, or for the Chief Justice of the Court of Queen's Bench.

1561. Are not the Chief Justice and the Lord Chancellor above control and perfectly independent; and is not the coroner, on the other hand, in some degree subject to the control of the magistrates?—The Lord Chancellor can be removed from his office by the Crown; the judges can be removed from their office by an address to the Crown from both Houses of Parliament. It is true that the coroner is elected to his office by the people, but he is under the control of the superior judges, who may, upon any occasion, punish him for misconduct.

1562. Do you think it desirable that a Member of Parliament should fill the office of coroner?—Most decidedly; and I hope that in the case of this county some advantage will arise to the office in consequence of a person being in the House of Commons who holds the office.

1563. In what way do you consider it advantageous?—Because he will be enabled to bring his experience of the working of the office into operation if Parliament should legislate on the subject of the coroners' duties.

1564. Colonel *T. Wood*.] Your accounts were first referred back, I think, in the month of October?—Yes.

1565. How many inquests were objected to at that time?—No number was stated.

1566. Were not two of those inquests held by deputy?—No, not one.

1567. Were there not two inquests in the month of September and one in August held by deputy?—There were two inquests held before one jury by deputy at



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the end of August or the beginning of September, but there was no objection made to those inquests, because possibly they were not known to the magistrates.

1568. Were not those two inquests included in the number that were referred back?—No; and no objection was made with reference to them.

1569. Had you received no intimation in any way that the magistrates considered the holding of inquests by deputy objectionable?—Never, until the account was disallowed; not the slightest intimation of the kind.

1570. Did you not write a letter to the magistrates explaining to them that there was an inquest held by you by deputy during illness?—On one occasion, when I was ill; but that alluded to the period of my sickness.

1571. When was that letter addressed to the magistrates?—Not until January or February in the year 1840. The first objection with regard to inquests by deputy, was raised after my illness, and that lasted from the 28th December 1839 to the 11th January 1840, consequently that account could not have gone in until the end of January or in the following month; my letter must have been written after that period, because it had reference to the objection in question.

1572. Does that period include the whole of the number of inquests which you held by deputy?—The period of sickness and the two inquests which were taken before one jury in August or September include every one; upon no other occasion has there been a single inquisition taken by deputy for me.

1573. The inquests taken in August and September would not appear in the same accounts with those that were subsequently held?—Certainly not; the expenses of those inquests were paid without remark or observation; but then I ought to state that their having been held by deputy does not appear on the face of the inquisitions; so that the magistrates could not judge by those two inquisitions that the two inquests had been taken by deputy.

1574. You stated that the office of coroner was a very peculiar one; that the coroner, in fact, stands between all persons in authority and the people, it being his duty to inquire into the causes of death for the purpose of preserving human life; how do you reconcile, with the importance of those duties, the propriety of holding inquests by deputy?—In my own case no inquests were held by deputy, excepting upon the occasions that I have referred to; and if it had not been the practice to take inquests by deputy in the county for 40 years previously, and probably for a much longer time, I should not have employed a deputy without thoroughly investigating the subject; but with reference to the appointment of deputies generally, I can easily reconcile the practice of engaging such gentlemen, as being strictly in conformity with every principle of sound policy and propriety. The sheriffs, for example, perform the most important public functions; they exercise jurisdiction in criminal and civil cases; yet nearly all their duties are performed by deputy; but, certainly, as a provision against abuse, as a check against misconduct, if any alteration of the law were made upon the subject, I should strongly recommend that the coroner should be responsible for the acts of his deputy.

*William Baker, Esq.*, called in; and further Examined.

*W. Baker, Esq.*

1575. *Mr. G. Knight.*] IN the analysis of the account of disbursements made from 14th October 1839 to the 7th December following, it appears that Mr. Wakley charged or paid for the medical witnesses whom he had called in, 16*l.* 16*s.*, in the same time that you charged, as it appears by this analysis, 87*l.* 3*s.*; in what way do you explain this great difference?—I think there must be some mistake about it; I do not know, unprepared as I am now, how I can rectify that without reference to the accounts. The vouchers are delivered in to the clerk of the peace, which will satisfactorily account for the expenditure which has been made.

1576. *Chairman.*] The statement in question was laid before the Committee by the clerk of the peace, and in that statement it appears, the expenses for each case for Middlesex, and from the 14th October 1839 to the 7th December following, was 3*s.* 1½*d.* for medical witnesses, in the cases of inquests taken by Mr. Wakley; 14*s.* 10¾*d.*, in the cases of inquests taken by yourself; is there nothing in this apparently incongruous return which you could possibly explain to the Committee?—It seems to me that the best way of explaining that matter will be to have the documents, which will show how much was paid for medical witnesses, and how much for other witnesses.

1577. But this statement refers only to the medical witnesses?—The question, first of all, will be to ascertain whether it is accurate; and if it is accurate, the only

only answer I can give is, that Mr. Wakley may dispense with medical testimony in cases in which I, as a lawyer, may consider it absolutely necessary.

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1578. Have you any doubt as to the accuracy of those returns?—I am staggered at the extreme difference in the amount; I cannot, without reference to the accounts, ascertain any thing about it; there is no other variation in my payments, that I am aware of, at that period from any other; they are all very much the same, and I think you will find that the expenses of the inquests, and the expenses of the witnesses, are almost nearly the same. If there had been any extraordinary difference, I should have found it out; if my fees came to 150*l.*, the expenses would be somewhere about 150*l.*, and I can never have seen any such extraordinary difference at any one period, so as to account for that; I think there is some mistake as to that, and the best way to set that right is to have the documents; but great allowances must be made for the pauperized state of my district.

1579. You have held the office of coroner for some years, and you are aware that the office of coroner has been the subject of recent and repeated investigation before the Middlesex magistrates?—Yes.

1580. You are also aware that they have thought it right, in one or two instances, to exercise the discretionary power which is vested in them; have you ever, during the whole period in which you have acted as coroner, felt yourself fettered or intimidated in the discharge of your duty, by any apprehension whatsoever of the supervision or control of the magistrates?—That is rather a wide question. I felt annoyed by the inquiries into my accounts, which were delivered in, the payments in which, I was ready to swear, were faithfully and properly made; I felt a little annoyed that they should call me before them, for the purpose of minute examination, and for the purpose of inquiring into the particular inquests which were held, which was one of the inquiries they made. I produced several documents, to show that they were properly held, and there was no objection afterwards taken. I felt annoyed, but I do not say that I was intimidated, or that I felt any inconvenience, beyond that of delay in the payment of the accounts.

1581. Was not the annoyance arising principally from the present state of the law that the coroner should be called upon to submit his accounts to investigation after he has sworn to their accuracy?—I think it does, certainly; before that time there was no order to have them sworn to.

1582. Then, in fact, the magistrates are not so much responsible for this annoyance as the state of the law?—I think not; I have no charge to prefer against the magistrates for any improper annoyance in the performance of their duty.

1583. Would you propose any alteration in the law on the head that the coroner should not be called upon to swear to his accounts?—No; I have no wish whatever, myself, to prevent any inquiry of any sort or kind in reference to my own accounts; the more stringent the inquiry the better I am satisfied; I have nothing to be afraid of; I do not care how strong the exercise of it is.

1584. The inconvenience is more a matter of feeling than of real grievance?—Exactly so, as far as I am concerned.

1585. Lord *Eliot*.] Does the answer which you have just given apply only to the auditing of the accounts or to the discretionary power exercised by the magistrates in determining whether inquests are necessarily held?—I certainly have an objection to the magistrates inquiring into the propriety of holding inquests in certain cases, because they cannot exercise any discretion upon the subject, or any proper judgment upon the occasion.

1586. You conceive that in that respect the law requires some modification?—I think that the power as it has been exercised hitherto by the magistrates has not been such as to render any new law necessary; they have caused a partial obstruction on the ground of inquiring into the cases, but there has been no practical result that is injurious in any way.

1587. Mr. *G. Knight*.] How do you understand the word “duly”?—It is difficult to understand it; the question is, whether it means “according to law.”

1588. That is your understanding of it?—The Court of Queen’s Bench understand it in a totally different way.

1589. Mr. *Wakley*.] When you say that the Court of Queen’s Bench understand it differently, what case do you refer to?—The Court of Queen’s Bench seems to give to the magistrates the exercise of the right of determining whether an inquest is held properly or not, as to the nature of the case, and not as to the mode of holding it.

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1590. Do you know a case in which that question has ever been raised?—Only incidentally.

1591. That is, extra-judicially?—I said I thought that was not sound law; that Lord Ellenborough gave his opinion in that case hastily, and without proper information upon the subject.

1592. Mr. *Gally Knight*.] Was that the only case?—Yes, the only one; it was an extra-judicial opinion expressed by him; a sort of gratuitous opinion expressed upon the subject.

1593. Would it not be desirable that the case should be argued in the Court of Queen's Bench?—I have no wish to have the case argued over again; it is utterly impossible for any coroner in the district I live in, until he comes to the place, and goes into the case, to know whether it ought to be held. The extreme poverty and wretchedness of the neighbourhood renders it almost impossible to exercise any discretion.

1594. Mr. *Williams*.] Have you lately held an inquest upon a body which has been removed from a distant part of the country to Homerton?—Yes, I have.

1595. Was that person found dead in his bed?—Yes.

1596. Where?—At Twickenham.

1597. And removed from Twickenham to Upper Homerton?—Yes.

1598. What was the situation in life of the person who died?—He was the son of a colour manufacturer, a gentleman of property and respectability; he has got a very large house at Homerton; I happened to go into it; I had no previous knowledge of him.

1599. Are the parties who removed the body liable to any penalty for having made such removal?—I apprehend they are liable to an indictment at common law, or to be mulct.

1600. Is it the duty of the coroners to institute proceedings against them for having done it illegally?—Not necessarily; any person may do it; it would be the duty more particularly of some of the parishioners. If there was an offence against the law, the coroner may do it.

1601. Could the township be amerced where the body was found?—Yes.

1602. Lord *Eliot*.] Do you know the beadle of the parish of Shadwell?—Yes; his name is Deverell.

1603. Are you aware that he receives a salary?—He receives a salary, as far as I could collect from him, for other purposes than those of coroner's duties; but the extent and nature of them I do not know.

1604. Are you aware he receives a salary of 76*l.* a year?—I do not know the amount of it; I have understood that he receives a salary.

1605. Did you know when the new schedule was made that his payment was withheld for summoning juries on coroners' inquests?—I think I did, but I will not be positive; he afterwards satisfied me that the salary he received was applicable to a totally different purpose, and then I allowed it to him.

1606. And you now think that you are complying with the directions contained in the schedule, by continuing to him the payment which he formerly received, although he receives a salary from the parish?—I have considerable difficulty about that, and I have abstained from doing it in almost every instance where I could; I only allow it where I consider it as quite clear that there is no absolute salary for that particular purpose; that has been continued from the earliest period down to the present moment.

1607. Do you know that the warrant is now sent to the constable, that the constable gives a receipt for the money, and hands it over to the beadle as his deputy?—The warrant is in the first instance issued to the constable; then I look to the constable for the performance of the duty; the duty is not always performed by himself in person, but it is sometimes performed by the other officers of the parish, to whom he issues his precept, and then I pay that part of the money as his agent.

1608. The summonses are sent to the constable and served by the beadle?—Therefore he is agent to the constable, and he is the party entitled to the fee.

1609. But the duty is now invariably done by the beadle, as his deputy?—No.

1610. I am speaking of the parish of Shadwell?—I have sometimes seen the constable there himself; he acts for him, I have no doubt, because he finds he cannot do the duty as it ought to be done, having generally been done by other persons; the constables choose to place the duty in the hands of other persons; it is not worth their

their while to do it for the fee; the beadles are moving about the parish and they do it for them; I might mention with regard to Deverell that I desired him to come here; I paid him more for the purpose of raising the question, that I might have something distinct and positive as to whether he is the party the magistrates intended should be excluded or not.

1611. *Mr. Wakley.*] Do you consider that the Act of Victoria gives the magistrates power to exclude any parties?—No; it gives them the power of settling a schedule of fees which may be of an exclusive character.

1612. Was it not stated in the Act that the law was altered for the purpose of providing payments out of the county-rate which had been discontinued from the poor-rate in consequence of such payments having been declared illegal?—There is no doubt that that was the sole cause of the passing of that Act of Parliament; the Poor Law Commissioners had refused any payments for fees out of the poor-rate, and a fresh mode of payment became necessary, and that Act of Parliament provided for that fresh mode of payment.

1613. Do you believe from your own experience that all payments can be withheld from constables for the duty which they are called upon to perform at coroners' inquests consistently with the ends of public justice?—No, I do not.

1614. Is the duty of giving notice to the coroner one that can sometimes be evaded by the constable without subjecting him to any penalty or any public censure?—Yes, I think it is.

1615. *Mr. Williams.*] Do you consider that the new schedule has placed you in a situation of great difficulty to decide according to its provisions whether parish officers are paid salaries or not?—I do; I think there is very great difficulty.

1616. And do you consider that that difficulty operates against proper vigilance being used by parish officers in giving information of deaths to coroners?—No; I do not think it has had that operation yet, because the duty has been thrown upon the constables; wherever the parish officer who has been paid has been refused on account of being in the receipt of a salary, the duty has gone to the constable, who is the real officer, and who is, generally speaking, unpaid.

1617. Then you pay him a fee?—Yes; considering these men as his agents.

1618. So that, in point of fact, this new schedule operates as a nullity?—To a certain extent it does; I do not know that it would, provided it was enforced rigidly; if it were so, it might be very serious in obstructing the course of justice.

1619. Now that it has been in operation six months, do you understand the law upon the subject?—I cannot tell from want of proper information how to exercise a proper discretion in payment.

1620. *Chairman.*] The order prohibiting the payment to the constable where there was any salaried officer in the parish, was subsequent to the schedule, and formed no part of it. Did you ever entertain any doubt as to its validity?—Never; I considered that the schedule was capable, by the clauses in the Act, of being amended, and the schedule being amended became itself the schedule; in fact it was an amendment of the schedule.

1621. In fact it became part of the schedule?—Yes.

1622. Was a copy of the order sent to you as coroner?—Yes.

1623. And do you know whether a copy was also deposited with the clerk of the peace?—I received it from the clerk of the peace, therefore I presume it was deposited with him.

1624. Then in fact all the provisions of the statute, in regard to the schedule, were observed in regard to the order?—I think so; the Act of Parliament is pretty clear upon that. The words of the Act are, "It shall be lawful for such justices in general or quarter sessions assembled, and for such town council at any such quarterly meeting as aforesaid, from time to time to alter and vary such schedule as to such justices and town council respectively may seem fit; and the said justices and town council respectively shall cause a copy of every such schedule to be deposited with the clerk of the peace of each county, riding, division, district or borough, and one other copy thereof to be delivered to every coroner acting in and for each county, riding, division, district or borough as aforesaid."

1625. *Mr. Wakley.*] The new schedule states expressly that the payments specified in it shall not be allowed to domestic servants, nor to constables in the metropolitan police force, nor to parochial constables or officers receiving regular salaries or wages; the order of the court, which was received in February last,

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declared, in addition, that payments should not be allowed to any constable when there was a salaried constable in the parish. Now, seeing, if you believe the order to be a legal instrument, that all payments are interdicted, not only to the constable, but to the officer who was in receipt of a regular salary or wages, and also to every constable in every parish where you find a salaried constable or officer, whom can you legally pay?—Not any body; that is the difficulty I have in ascertaining it.

1626. *Chairman.*] Still, practically, you have felt no difficulty?—I have felt so much difficulty that I have gone on paying sometimes where I doubted the propriety, in order that the magistrates might, if they chose, ascertain whether it was right, by the disallowing of it in the account, and my payment to Deverell was made under such circumstances.

1627. But the order has become inoperative in your district?—To a certain extent; I do not find any practical inconvenience, because payments have been made to the constable, who is never in any instance a paid officer; I consider all these payments are made to him; the warrant is issued to the constable; the constable is the man who does the duty; he does it by the act of another person.

1628. *Mr. Williams.*] Is it your opinion that parish officers, whether they are paid salaries or not, should be paid by the coroner for giving information of deaths in which inquests ought to be held, in order to induce them to use due and necessary diligence in giving such information?—Yes; I think it proper that it should be paid to them for that purpose.

1629. And is it your opinion that a relaxation of duty, in consequence of constables not being paid for giving information which will subject them to trouble, will take place, in consequence of such non-payment?—Yes, I think it may; it is quite clear they can by law receive that emolument from no other source than through the medium of the magistrates, after the prohibition to the paying it out of the poor-rates.

*Veneris, 17<sup>o</sup> die Julii, 1840.*

## MEMBERS PRESENT:

Lord Eliot.  
Mr. Gally Knight.  
Mr. Aglionby.

Mr. Williams.  
Colonel T. Wood.

LORD TEIGNMOUTH IN THE CHAIR.

*William Baker, Esq., called in; and further Examined.*

1630. *Chairman.*] ARE those in your hand the papers you proposed to deliver in when you last appeared before the Committee?—Yes; I wish to deliver in a paper showing the grounds of the increase in the payments made to medical witnesses in my district, and I beg to deliver in a letter I addressed to the Inspector-general of Births, Deaths and Marriages.

[*The same were delivered in, and read, as follows:*]

(A.)

17 July 1840.

My attention has been drawn to a statement in the evidence of the clerk to the committee of accounts at the Middlesex sessions, showing a considerable increase in the payment made by me, as coroner, to medical witnesses in the eastern district over those made by the coroner in the western; and it is important that I should explain, as far as lies in my power, the reasons of this discrepancy.

It will be found to arise mainly from the very marked and peculiar character of the very dense district over which I preside, which consists, at the same time, of a very highly pauperized and criminal population; and as I was at much pains, in the month of November 1839 (the period to which the account has reference), to address a printed letter to Her Majesty's justices of the peace for the county on this subject, with a view to explain to them the causes of such increase, and which I have no doubt was satisfactory to them at the time,

I have

I have most earnestly to entreat the attention of the Committee to some extracts from that letter, as best calculated to obviate any erroneous impressions which the statement alluded to may have created in the minds of the Committee.

I have therein stated that the population of my district consists of nearly half a million of inhabitants, chiefly (if not almost entirely) of the very lowest and most degraded classes in society. It is, moreover, a population comprised of such mixed and peculiar classes of persons as is rarely congregated together in large masses in any other portion of the inhabited globe. To give some idea of the motley group, I would mention, in addition to those classes which constitute the mass of society in most localities, those of Irish labourers, river and dock labourers, coal-whippers, lumpers, river dredgers, river pirates, watermen and sailors, interspersed and mixed in squalid and filthy localities with men and women of the most abandoned character, such as dealers in old rags and iron, costermongers, prostitutes, sharpers, thieves, receivers of stolen goods, utterers of base coin, mendicants and others, of the very lowest grade in society, who have no visible means of obtaining their daily subsistence but by the plunder of the adjoining neighbourhood, by marauding abroad by day and stealing back to their filthy cribs at night, in these secluded haunts. The Rev. Mr. Stone, the rector of Spitalfields, in his evidence given before the Committee of the House of Commons in 1838, describes "the whole line as more or less the constant abode of fever and other infectious disorders; and he states the whole route to be inhabited by an exceedingly criminal population;" and he adds, that "women of the lowest class, receivers of stolen goods, thieves and the most atrocious offenders find in these obscure haunts concealment from the hands of justice; and the extreme poverty, the extreme unwholesomeness of the neighbourhood, and the extreme immorality, render it necessary that they should be exposed to public observation." Speaking of the same district, but more particularly of Spitalfields, Whitechapel and Bethnal-green, Dr. Southwood Smith, in his last Report to the Poor Law Commissioners, 1839, describes the locality to which I allude thus: "These neglected places are out of view, and are not thought of. Their condition is known only to the parish officers and medical men, whose duties oblige them to visit the inhabitants, to relieve their necessities and attend their sick; and even these services are not performed without danger; such is the filthy, close and crowded state of the houses, and the poisonous condition of the localities in which the greater part of the houses are situate from the total want of drainage, and the mass of putrefying matters of all sorts which are allowed to remain and accumulate, that during the last year, in several of the parishes, both the relieving officers and medical men lost their lives, in consequence of the brief stay they were obliged to make in the performance of their duties. No returns can show the amount of suffering which the industrious poor have to endure from causes of this kind during the last year; but the present returns indicate some of the final results of that suffering. They show, that out of 77,000 persons, 14,000 have been attacked with fever, one-fifth part of the whole, and that out of the 14,000 attacked, nearly 1,300 have died." And in a paper lately published as to the moral condition of the poor in this locality, it is observed, "that it is scarcely possible to imagine an equal amount of population, in a Christian country, more destitute of the means of moral and religious instruction." Indeed, so marked and peculiarly circumstanced is the district over which my duties extend, that it has not only called for the particular observations of Dr. Southwood Smith, in this as well as former Reports to the Commissioners, but for the especial notice of Mr. Farr, in his very able letter to the Registrar-general of Births, Deaths and Marriages, which will be found in the Appendix to the First Report on the Registration. He describes "the inhabitants of these densely-populated districts as extending from 123,904 to 186,046 on a square mile, and the greatest density as 243,000 inhabitants to a geographical square mile," adding, "that population increased but very slightly in those districts in the interval between the census of 1821 and 1831, whence it may be inferred that the ground is nearly all occupied."

In a series of valuable tables, he deduces the following extremely important facts, serving to illustrate the particular case we are inquiring into, namely, the increase of inquests and the consequent expenses ensuing therefrom.

The annual rate of mortality in these districts will be found to be four per cent., whilst in others less crowded and of a better description it is only two per cent.

For instance:—

	Annual Rate of Mortality p' 100.
Whitechapel Union - - - - -	4 - 5
Shoreditch - - - - -	3 - 2
Bethnal-green - - - - -	3 - 1
St. George-in-the-East - - - - -	3 - 2
St. George, Hanover-square - - - - -	2 - -
Islington - - - - -	2 - 2
St. James, Westminster - - - - -	2 - 1
City of London - - - - -	1 - 8
Lambeth, Surrey - - - - -	2 - 1
Camberwell - - - - -	1 - 9

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"In other words, the people in one set of circumstances (in the better localities) live 50 years, whilst in another set of circumstances (in the more distressed districts) they do not live more than 25 years. In these wretched districts," he adds, "nearly eight per cent. are constantly sick, and the energy of the whole population is withered to the roots. Their arms are weak, their bodies wasted, and their sensations embittered by privations and sufferings; half the life is passed in infancy, sickness and dependent helplessness." He adds, "that in the neighbourhood of Whitechapel, 3,908 die annually, out of a population of 100,000, and that it will be found, *ceteris paribus*, that the mortality increases as the density of the population increases." And he adds in a note, "that the mortality in the city of London has been augmented 10 per cent."

As some observation has been made in your court, in reference to the increased number of inquests, as well as of expense, in my densely crowded district, over that of my colleague, I have thought it necessary thus to point out what has been the rate of mortality in several of the principal leading parishes in each district, which will show, that in my district, as Mr. Farr has above stated, there is an increase from its density of nearly two to one in the most densely crowded parts, which necessarily involves increased inquiry; and in such a neighbourhood as I have described, it can by no means excite surprise, therefore, that there is an increase of expense in medical and other witnesses, who from their poverty are more likely to seek for a remuneration for their attendance, as well as being more liable to be called constantly into action than in a less crowded neighbourhood. It is, however, remarkable, that in my district, upon an average taken for several years past, the inquests in which verdicts of "Natural Death" have been returned, have been fewer than in the western district of the county.

I subjoin a Summary from the Statistical Returns of the principal parts of my district estimated on the last census, now, however, materially increased:

DISTRICT.						Population in 1831.	Deaths by Typhus.
Whitechapel Union	-	-	-	-	-	64,141	495
Stepney Union	-	-	-	-	-	72,446	191
Bethnal-green	-	-	-	-	-	62,018	172
Shoreditch	-	-	-	-	-	68,564	173
St. George-in-the-East	-	-	-	-	-	38,505	160
St. Luke	-	-	-	-	-	46,642	67
Hackney	-	-	-	-	-	34,527	20
Poplar Union	-	-	-	-	-	25,066	19
						411,909	1,297

I have introduced in the above table the column showing the mortality by typhus fever, for two purposes: First, as an answer to a worthy magistrate, who put to me, when I was before him, the question, as to holding inquests in deaths by fever and apoplexy; and, secondly, to prove by the best data I have yet met with, that so far from having increased the number of inquests beyond the legitimate intention of our ancestors, I still, from a variety of causes, fall short of the absolute number that ought to be holden.

Mr. Farr, in his letter to the Registrar-general, to which I have referred, states the following truth. "If all the violent deaths had been entered in the abstract, the mortality of males, under this head, would have probably equalled the mortality from typhus," and he adds, emphatically, "this deserves attention." Now the mortality from typhus, in my district, amounts (including the out districts not inserted in those specified above) to 1,350 annually; about half of that number are males; this will give the amount of violent deaths among the males at 675; take then the violent deaths among the females at half that amount, or 337, the number of violent deaths will stand thus:—

Violent deaths among males	-	-	-	-	-	-	675
Violent deaths among females	-	-	-	-	-	-	337
Total	-	-	-	-	-	-	1,012

and add to these the sudden deaths apparently unaccompanied by violence, but occasioned by privations, starving, and other mysterious circumstances, and deaths the primary cause of which has been some injury inflicted in malice, or arising from carelessness, or want of caution, within the legal period for investigation and punishment, viz. a year and a day, the amount for inquiry by the coroner in my district will be increased to about 1,500, being double the amount of the inquests actually held. With the first class, violent deaths, I have of course no discretion to exercise, but must do my office *instantly*. Of the last, all that I can say is, that the exercise of any discretion is, at all times, in such a district as mine, of the most painful and embarrassing nature, arising from the extreme difficulty of acquiring the knowledge of any facts which may be safely relied on, the information being obtained from persons, who may seek to cover by concealment their own infamy, and often guilt. Whenever I can  
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avail myself of a surgeon's certificate, or other undeniable information, I have never made any difficulty in doing so; but it should be borne in mind, that if the opportunity of inquiry is not seized in the first instance, decomposition of the body renders it ineffectual, as regards the dead, whilst malicious and ill-founded reports gaining credence, render it at the same time indispensable as regards the living; and in the exercise of discretion it must also be at all times considered, that as civilization increases, the refinement in crime keeps pace, and calls for increased vigilance on the part of the coroner to endeavour to discover the delinquency. In the rude ages, the means resorted to to gratify a deep-lodged hatred, or to possess the property of others, was always of a bold and violent description, and left its traces behind; but now villany is so refined, and so many means have been discovered whereby life may be taken, and the murderer leave scarcely a clue to his discovery, that it seems almost indispensable that every sudden death, in such a district as mine, should be inquired into with the most searching scrutiny.

Mr. Farr, in his letter to the Registrar-general, to which I have above alluded, expresses himself on this subject as follows: "It is certain that sudden death sometimes happens without appreciable change in the organization, at least any change which a rude cursory *post-mortem* examination can detect; and it is not improbable that a certain number of cases of poisoning escape undetected by the coroners and the juries, who can be expected to know little of the symptoms either of poisons or disease, and are very rarely assisted, as in other countries, in their decision by the information which a careful examination of the body and an analysis of the contents of the stomach would furnish. The result of this negligence is, that little is known positively of the causes of sudden death; and the facility of procuring all the more intense poisons, as well as the prospect that the effects of poisoning may be confounded with natural causes, offers a strong temptation to the commission of that dreadful crime. Coroners' inquests are also held upon all prisoners who die in gaols, and the ordinary verdict is, 'Natural Death;' whence it would appear that the inquest in gaols is at present very much a matter of form, although it was no doubt instituted to ascertain the real cause of death, whether it were a common disease or gaol fever, dysentery or violence. The causes of death, registered as the result of solemn juridical investigation, are the most unintelligible in the register; as it is impossible to attach a specific idea to 'Natural Death,' to 'Visitation of God,' and to several other phrases in use in coroners' courts.

"In order to render the register as correct as possible, it is desirable that the cause of death should be directly certified in every instance by the medical attendant, who might either leave the certificate with the informant or give it, upon application, to the registrar. When the medical attendant is the informant, he will of course sign the register, as directed by the Act. The duration of the fatal disease should be stated, when known, in hours, days or years, which should supersede the words 'Sudden,' &c., and in the end furnish many highly important results. The registrar should insert the terms corresponding to those in italics in the column of the register headed, 'Cause of Death.'

"The nature of disease and the parts affected should be specified in cases of this kind.

"The primary and secondary diseases should be specified in the registers."

It is also material to be taken into account, that there is in my district, comprising the river Thames, as well as the docks, basins and canals, a very considerably larger proportion of cases of drowning than occurs in the western district, a circumstance which greatly adds to the fees for bringing the body on shore and receiving it.

Now, I have been gravely asked, "Do you hold inquests in cases of fever and apoplexy?" In the face of such statistical returns as are now made public, and which I have above stated, it surely must have been known to the inquirer that such had not been the course of conduct pursued by the coroners.

If I had been asked whether cases of fever and apoplexy were not occasionally inquired into, when they were the proximate or immediate cause of death, the primary and original cause being an injury to the person, the question would have been a proper one and easily answered in the affirmative; and I should have added, that occasionally instances would occur, when the suddenness of the death even justified inquiry in the simple state of fever, such as, where death may have been caused or accelerated by the improper administration of drugs, improper treatment (medical or otherwise), privations, neglect, want, starvation or other misconduct, and of which instances will occasionally be found of the most embarrassing character, and requiring the most rigid and strict investigation by a coroner. As to the subject of apoplexy, I feel at no loss in grappling with it, however broadly it may be put; I should say boldly, that of all cases, those of sudden death by apoplexy, in my district, are by far the most important, and the very last to be exempted from inquiry on the ground of any fancied inexpediency, as I will immediately proceed to show.

There is scarcely a street of any extent in the whole of my district that has not its accompanying gin palace or beer shop; in many there are half a dozen, and in some a dozen or more. No one who does not frequent these scenes of vice and profligacy can form any conception of the crime and wretchedness which exist in the neighbourhood of these receptacles of mischief, or can form any notion of the means which are resorted to, in order to excite the minds and bodies of the victims of these places of profligacy to acts of violence and crime. Whether the mind regards the high state of excitement, from which broils of the most fearful description are hourly arising, often terminating in death or the low stage, which supervenes upon a season of debauchery, in which the mind and the body alike sink into a state of horror and prostration, producing suicide in all its varied forms, it can only dwell in either case on those results which furnish daily and almost hourly materials for the inquiry

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of the coroner; and it requires, as I know by experience, something more than medical knowledge or practice; it requires inquiry into previous conduct to distinguish, under the complicated evils which befall these wretched victims, whether the deadening effects produced on the system are the result of violence or proceed from natural causes. Many have been the instances in which medical men well practised in cases of this description have attributed coma, which takes place, to the effects of mere inebriation, which the *post-mortem* examination has discovered to have proceeded from a fractured skull, exhibiting no traces of external violence; and constantly are cases occurring before me, in which persons, in an apparent state of drunkenness, have been taken to station-houses, whose lives have been closed in apparent apoplexy, which have been subsequently traced, either to have been terminated by some injury to the person, or by something of a deleterious nature administered to, or taken by the unhappy sufferer. To close the door upon cases of this kind, by stifling inquiry in any case of apoplexy, would only be opening another door to the commission of crime, and affording the criminal the most facile means of escaping punishment.

I have often been struck with the great number of cases of suicide committed at an early hour of the morning after an apparently quiet night's rest, or committed even during the hours of rest, and I have had many conversations with medical gentlemen of experience on the subject. They generally attribute it to what is called the low stage, supervening upon over-excitement, in which the head is racked with pain, or the mind so stung by remorse and worn down in its energies, as to cause the unhappy sufferers to seize, in a moment of despair or phrenzy, the long-cherished poison, the razor or the rope, as opportunity or the phrenzied fancy may enable them. Who is proof against these calamities, and who is to distinguish between the most active poisons used on such occasions and mere apoplexy?

But this is only one class of cases; look at others. Look at the mind over-burthened by extreme fatigue, arising from various occupations into which a spirit of speculation or an immoderate thirst for gain has driven the unhappy adventurer; look at loss of character, unmerited attacks upon character, loss of property, domestic troubles, and the bereavements of domestic affections; look at the body wasted by disease and pain, and the mind worn down by cares and vexation; who is to measure all the consequences resulting from sudden death under these complicated evils in society without inquiry into every case in a neighbourhood so peculiarly circumstanced as mine is? I have thought much and deeply on this subject, but I have never yet been able to discover how or where the line is to be drawn as respects inquiry in such cases.

Besides all this, I have six miles of water frontage on the river Thames in my district, extending from the Tower to the river Lea, in Essex, the whole extent of the crowded neighbourhood adjoining, which is more or less the abode of persons of the very lowest description, getting their scanty means of subsistence upon the river, and of crimps and sailors; and not only of sailors who dwell in wretched and loathsome lodgings, amongst women of the most drunken and abandoned character, but of sailors from all parts of the world, who are the temporary inhabitants of the courts, alleys and receiving-houses in the vicinity of the water. They are located there during the time the vessels to which they belong remain in the river Thames, which is often so densely thronged as almost to impede the river passage; and my district also includes the East and West India, the London and St. Catherine Docks, and the Regent's Canal Basin, in some of which the sailors are not even allowed to sleep. I ask you, is inquiry as to cases of apoplexy, or as to sudden death of any kind, to be restricted in such a neighbourhood as this? What are the daily and nightly scenes which are exhibited in these recluse and loathsome receptacles? They are notoriously those of the most brutal drunkenness and debauchery, where excessive gin drinking (alone a sufficient cause of apoplexy and death) prevails every hour of the day and night, without the slightest check upon its inordinate exercise, accompanied by hocussing, drugging, and a thousand other wily arts, by means of which the hard-earned pittance of these miserable men is robbed and plundered to the last penny, by women of the most abandoned character and crimps; and the inhuman wretches not only leave their victims a prey to the most vile and loathsome disease from ill treatment and intoxication, but often cause them to sink under a slow and lingering poison, caused by drugs or by excessive draughts of alcohol, to cover the fraud and felony they have committed.

Again as to fights, and to injuries arising to the person from blows and falls, occasioned by the squabbles and disturbances which this state of profligacy gives rise to; as well as those which arise out of trades-union contests, public-house and family cabals. The injuries are not at first apparent, but in a few days, or even in a few hours, they may, without communication made by the unhappy sufferers, all partake of the character of and terminate in apoplexy. If any doubt is entertained on the subject, or the picture I have drawn is supposed to be too highly coloured, I need only refer you to what Messrs. Paris and Fonblanque say, in their excellent work on Medical Jurisprudence, vol. ii. p. 436, as to the effects of drinking ardent spirits, in corroboration of my statement. Those who live in the neighbourhood know too well its practical results to doubt it for a moment.

"The ordinary effects of an excessive dose of any spirituous liquor are too well known to require description, and generally pass off without the necessity of professional interference. In cases, however, where the draught has been very large, the person has suddenly fallen down in a state of complete insensibility, and has exhibited all the phenomena of apoplexy, or, in some instances, he has expired almost immediately. The insensibility of the patient may render it difficult for the practitioner to distinguish the immediate cause of the symptoms; although his history for the last few hours and the spirituous odour of his breath will generally announce the true nature of his situation. Mr. Brodie observes, that there

there is a striking analogy between the symptoms arising from the injection of spirits and those produced by injuries on the brain; concussion of the brain, which may be considered the slightest degree of injury, occasions a state of mind resembling intoxication; pressure on the brain, which is more severe than concussion, produces loss of motion, insensibility, dilation of the pupils, laborious and stertorous respirations and death."

"Large draughts of liquids containing alcohol would appear to destroy at once the functions of the brain, without occasioning that previous stage of excitement which is produced by smaller quantities of spirit, whence coma and insensibility are the immediate consequences; and the nervous energy being no longer conveyed to the muscles of respiration, the breathing becomes laborious, and the patient dies as he does in apoplexy, for the want of those changes in the blood which are produced by the respiratory functions." How then, I would ask, is a coroner to exercise his judgment or even to attempt to draw the line of distinction in cases of apoplexy without the strictest and most minute inquiry upon oath, into previous conduct? I pronounce it to be impossible, and that the attempt to suppress inquiry would be productive of no other than the most injurious and fatal consequences; for let it be understood and never forgotten, that after all it is the moral effect of the certainty of inquiry, in all such cases, and not inquiry into any particular case, which produces the real benefit and operates as the most salutary check upon crime and profligacy.

So impressed have I been with the importance of this subject, and so anxious have I been to second the march of public improvement, as far as the duties of my office would enable me, that I thought it right to address a letter, in August last, to the Registrar-general on the subject of the registry of deaths, a copy of which accompanies this statement, for the information of the Committee, serving to show to them that I have not been an inattentive observer of the modern improvements of the law, and at the same time accounting, in some measure, for an increase in the expenditure, as respects medical testimony.

To these, abundant extracts from my letter to the magistrates, which will show, I trust, ample grounds for large augmentation of medical charges in my impoverished district over that of the more opulent and populated district of the west, with its extensive rural vicinity, may be added other reasons equally cogent and important, and which render it a matter of the first necessity, that the coroner, in such a district, should not be restricted in his application to medical testimony, where death occurs in the ratio of three and two to one in other more favoured districts, the deaths arising, in very many cases, from severe pressure, starvation, destitution and neglect, as well as from causes of crime and disease, all more or less requiring the testimony of medical witnesses, to ascertain the real cause, and who, as the emergencies are greater, must be expected to abound in larger proportions in such a district.

Amongst others, may be first named the stringent regulations laid down by the Poor Law Commissioners for provision in such cases, and the omission of the exercise of which imposes upon those whose duty it is to carry them into effect, not only severe penalties, but, in case of death, an awful responsibility, calling for the most minute and searching medical inquiry on the part of the coroner.

In their circular to the police, dated 6th September 1837, are express directions given by the Commissioners to the relieving officers, the masters of workhouses and the boards of guardians, when sitting, to attend, in cases of sudden and urgent necessity, to give instant relief, whether the applicant for relief be settled in any parish, the union or not; and the duties of the medical officer, with relation to such cases, is thus expressed:

"To attend duly and punctually upon all paupers out of the workhouse falling or continuing sick within the limits of this district, including all paupers whom, by law, any parish of the union may be bound to relieve, whether belonging or not belonging to such parish; and whether under suspended order of removal or otherwise, and to supply all such sick paupers with all necessary medicines and appliances."

So tenacious, indeed, have been the Commissioners of the due and punctual performance of such duties (and which, from my professional pursuits, have become long familiar to me), that they have reiterated these instructional edicts in repeated letters, dated 12th December 1838, and the 7th of December 1839, in the latter of which they take occasion "to warn their officers that no consideration of past services will be deemed by the Commissioners a sufficient reason for their hesitation to remove any officer who shall have neglected his primary duty in relieving any case of urgent casual destitution."

I need not point out to the Committee how extremely important the office of coroner and the due and punctual execution of that office becomes, in cases of this kind where death occurs, as a salutary and wholesome check upon individual conduct in all cases, and how much it leads to strengthen the confidence of the public in the due administration of the laws.

Again, since it is especially required by the Act of the 6th & 7th Will. IV., cap. 86, that in every case in which an inquest shall be held on any dead body, the jury should inquire of the particulars therein required to be registered concerning the death, viz. the nature and cause of death, and the coroner is required to inform the registrar of the finding of the jury, and make the entry accordingly, it does seem very difficult, without resorting to medical testimony, almost in every case, to carry out the full intentions of the Legislature, enforced as the duty more particularly is, by the cogent requisitions of the Registrar-general, in his circulars to the registrars appointed by him, to work out its principle in the best possible manner.

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It may be in the power of a medical coroner to accomplish much, in this respect, by his own medical knowledge; but surely it is not to be expected of any coroner that he is to arrive at these conclusions without adequate medical testimony, taken upon oath, which I contend is, after all, the only legitimate mode by which the object can be effectually accomplished; the evidence being in the one case duly recorded, whilst, in the other, the result is made dependent, on a casual view of the body taken after death, without any previous knowledge of the party, and obtained upon a casual opinion expressed, without any record of it being left, either for the satisfaction of the public, or of those who may feel any interest in the result of the inquiry.

I have yet to learn the lesson, that it is the best mode of holding inquests by withdrawing valuable testimony, or of appreciating labours in inquiries of this nature, to judge of them by the minimum of expenditure; or that it is either wholesome, wise or just to cripple and limit the energies of the coroner in the pursuit of inquiry, by any parsimonious consideration of expense, and I would never consent to continue in office under such restrictions.

I hold, that whilst justice is to be duly meted out, and the law is to be respected and maintained, the consideration of expense becomes of secondary importance, and to be regarded as the dust in the balance, when placed in competition with the high and important objects which are to be attained.

Sure I am, that no just ground of complaint can arise on the score of expenses in coroners' courts, when it is known, that all the coroners' courts in the county put together, including those of Westminster, the City, Southwark and Tower liberties, having all the advantages of being itinerant courts, and carrying justice home, as it were, to the very door of the party, still do not entail upon the county so large an expenditure as a single metropolitan police court.

I furthermore wish it to be distinctly understood by the Committee, that the coroner can have no interest whatever in extending medical inquiry, but, on the contrary, has a direct interest in restricting undue expenditure in this and in every other way; as the money is advanced out of his own funds in the first instance, and ultimately received without any interest on such advance, and often at a distant period.

Many reasons may be assigned why the fees payable to medical witnesses in the western district are not so large as those in the eastern. The medical gentlemen who move in the higher circles are more regardful of their time and less regardful of their fees, and may perform the duty gratuitously, because it is but rarely required at their hands; but to those who move in a humbler sphere, and where the duty is more burthensome, it operates more powerfully as a stimulus to call for remuneration.

Another powerful reason is, that the western coroner has the gratuitous services of a very large body of medical gentlemen attached to the numerous hospitals, infirmaries, dispensaries, lunatic and other asylums and workhouses which so largely abound in that district (the medical officers of which are restricted by the Act from fees on inquests), whilst there is only one hospital where inquests are held at the eastern end of the town. The workhouses in the larger parishes at the west end of the town have, I believe, nearly all resident medical officers, which is the case in no instance in the eastern district.

I would mention only one more cause of increase in the eastern district as to medical expenditure, but it is one of so extensive a character, that it should not be lost sight of. It is in cases of drowning. In my district, comprising the East, West India, St. Catherine, London and Regent's Docks, canals and basins, besides six miles of river frontage in the most densely crowded portion of the collier pool and river Thames, many cases must naturally arise, whether as regards the resuscitation of bodies from recent discovery after accident, or as respects appearances on the body arising after decomposition has set in and disfigured the body, medical evidence is often deemed by the juries to be equally necessary and is often required, when I have thought it would add little or no information to the jury. These are cases of which few similar can arise in the western district from its peculiar locality.

I have thought it right, in a matter of this nature, to be somewhat diffuse in my explanation of the many circumstances which operate as to the increase of medical expenditure in my district, but I feel that I have not been more so than the subject requires; and as it is one of a large and extensive character, I have thought it would better conduce to the end required by the Committee, to submit it to them in this form, than under the more inconvenient method of interrogation and answer; but I shall be happy at all times in answering any further questions which may be required of me by the Committee.

*W. Baker,*

17 July 1840.

One of the Coroners for Middlesex.

(B.)

To the REGISTRAR-GENERAL of Births, Deaths and Marriages in *England*.

Sir,

3, Crosby-square, August 1839.

I HAVE read with much pleasure the copy of your first annual report with which you have been kind enough to favour me, and for which I beg to express my sincere acknowledgments.

It has awakened my attention to a subject which has long been considered by me to be of

of very great importance, namely, the best mode of obtaining the most correct returns from coroners, medical gentlemen and others, of the real causes of death.

The very able letter of Mr. Farr, accompanied by the invaluable tables which he has appended to it, will go far to impress the public mind with the importance of the measure, not only in a statistical, but in every other point of view, and lead, in time, I have no doubt, to a more perfect system in procuring such returns; and it is with that view that I have ventured to address a few observations to you, which, if carried out by a circular under your hand, addressed to coroners, medical men and registrars, may do much to promote and accomplish the object.

It appears to me that the members of the medical profession, in their certificates to the registrars of districts, are by far too loose and superficial in their detail as to the precise and real cause of death, and that, in most instances, the proximate or secondary cause is alone stated, whilst the more important, the primary cause, is altogether omitted. As regards the punishment of crime, this is most important; as, for instance, if death is caused by tetanus, or what is commonly called lock-jaw, they omit to state the wound or other injury which led to it; and innumerable instances may be found in the registers of deaths by "convulsions," "mortification," "paralysis," "delirium tremens," &c. &c., each of which may have been caused by some antecedent injury done to the system by force or violence, and for the commission of which, persons may be amenable in point of law, but who, through such loose returns, altogether escape its punishment.

I feel quite assured that very many cases of manslaughter, if not of the higher character of murder, by means of these imperfect returns, remain altogether uninquired into, and, of course, the delinquents go unpunished.

I have found the occasional checks given by the registrars, in not recording cases of this description without notice being given to the coroner, where their attention has been raised by the return made to them, to have been extremely useful and important, as leading to an instantaneous inquiry when alone it can be rendered effectual; and a more rigid adoption of the plan of reverting, in all instances, to the primary cause of death, would, I feel convinced, operate as a most salutary benefit to the public, by producing greater caution in individual conduct; for it is not so much the inquiry in the particular case that produces the benefit, but it is the moral effect of such an inquiry which is to be regarded, as opening the eyes of the public to the important fact, that every injury done to the person, however slight or trivial it may be, if it ultimately end in death, will be sure to be brought to light, and to undergo a careful investigation.

Many medical men are so little acquainted with the laws of the country as to be entirely ignorant that death caused by a want of proper caution amounts, in point of law, to a case of manslaughter, for which, if it be a lenient case, the individual may be fined a shilling and discharged, and if it be a flagrant case he may be liable to transportation for life. The more lenient cases attract little or no attention from them, and are set down as mere accidents. How many public-house and other rows, scuffles and violent proceedings and idle frolics occasion mischief to the person, at first apparently trifling, but which have ultimately ended in death, may have escaped detection and inquiry under the delusive terms adopted in the registers, "convulsions," "mortification," "delirium tremens," &c. &c., it seems fearful to contemplate.

Another ignorance which medical gentlemen also not unfrequently labour under is, as to the period limited. A year and a day is the period fixed by law for the punishment of crime; but if a transaction has taken place only a few months ago, how little attention is frequently paid to the tracing of effects to causes, and how much less attention where the circumstances have not been of a very aggravated character; and yet, if death has been caused by a trifling injury at first, it is surely necessary that an inquiry should be instituted, if it be decidedly against the law, as well as if the act had been more determined or violent.

I have known, I may safely say, some hundreds of instances in which I have remonstrated with medical gentlemen who have given certificates of the proximate causes of death in the manner I have described, on the impropriety of their conduct in not having given an intimation to the parochial authorities of the original injury to the person, when it has been caused by violence, of which they must professionally have acquired the knowledge, and the answer has constantly been, "I had not the slightest conception that an inquiry was necessary, as it happened some two or three months ago," or words to that effect.

Another barrier to inquiry also arises from a disinclination on the part of medical men to search into original causes, for fear that their time should be consumed in such inquiries; but the day is, I trust, arrived in which this scruple will be overcome by the provisions of the Act for allowing expenses to medical witnesses at inquests.

What right, I would ask, sir, has any medical man, by writing down the words "convulsions," "mortifications," or any other loose expression, to take upon himself the office of magistrate, jury and coroner, and by thus adjudicating consign to oblivion a case which the law through its institutions, when duly administered, might ascertain to be one of murder, or at least of manslaughter.

Mr. Farr, in his letter, states, that "tetanus generally follows wounds, and is therefore remotely caused by violence. Delirium tremens is also sometimes brought on by wounds in drunkards, and in persons exhausted by passion and misery." "The insane," he adds, "who die in lunatic asylums, have often been registered improperly under secondary diseases, such as apoplexy and diarrhoea. A considerable number of the deaths, returned 'Visitation of God,' 'Natural Death,' &c. at inquests, are apoplexies; but the proportion is unknown."

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As it seems highly desirable, in a statistical point of view, that the most complete and accurate return should be procured, of the cause of death in all cases, I feel anxious to know if you think it material that the most extended information should be obtained, in every case of sudden death, in which an inquiry takes place before the coroner? Hitherto they have been contented with the simple fact of death having occurred from causes purely natural, without requiring, in dubious cases, a *post-mortem* examination; but you must be aware that, in many cases, the precise cause of death is incapable of being ascertained without such an investigation, particularly where medical gentlemen are called in to view the body after death, and have had no opportunity of watching the symptoms under which the patient has laboured during life. This may, of course, be accomplished, in most cases, by a more extensive application to medical testimony, and the *post-mortem* examination when necessary, for which, as the law has made provision for the expense attending it, there appears to be no other objection than that which arises on the score of such expense.

On this subject, Mr. Farr observes, "All the sudden deaths are cases in which inquests were held. They would have been more numerous in the abstract, and so would the violent deaths, had it not been for some difficulties attending the registration of inquests; notwithstanding it appears that 184 males and 118 females per 1,000 die annually." And, he adds, "It is not improbable that a certain number of cases of poisoning escape undetected by coroners and the juries, who can be expected to know little of the symptoms either of poisons or disease, and are very rarely assisted, as in other countries, in their decisions, by the information which a careful examination of the body, and an analysis of the contents of the stomach, would furnish. The result of this negligence is, that little is known positively of the causes of sudden death; and the facility of procuring all the more intense poisons, as well as the prospect that the effects of poisoning may be confounded with natural causes, offers a strong temptation to the commission of that dreadful crime. Coroners' inquests are also held upon all prisoners who die in gaols, and the ordinary verdict is 'Natural Death.' Whence," he adds, "it would appear that the inquests in gaols is at present very much a matter of form, although it was no doubt instituted to ascertain the real cause of death, whether it were a common disease or gaol fever or dysentery or violence. The causes of death registered as the result of a solemn judicial investigation are the most unintelligible in the register, as it is impossible to attach a specific idea to 'Natural Death,' to 'Visitation of God,' and to several other phrases in use in coroners' courts."

I have thought it material to bring these observations more immediately under your view, in order that your attention may be practically directed towards them, as I feel convinced that, as far as coroners and medical gentlemen are concerned, it needs only your directing hand to suggest to them such requisites as the state of things I have described seems to call for, in the present advanced and still improving state of administering the laws and business of the state, to meet with a responsive effort, on their part, to follow out, in a more complete and efficient manner, those statistical returns which are deemed to be of such national importance.

I have the honour to be, Sir,

Your most obedient humble servant,

W. Baker,  
One of the Coroners for Middlesex.

Mr. Serjeant Adams, again called in; and further Examined.

Mr.  
Serjeant Adams.

1631. *Chairman.*] IT appears that an inquest was held by Mr. Wakley at Hayes, and that the jury upon that occasion brought in a verdict of wilful murder against an individual; it appears that the magistrates felt it necessary to go afterwards into an investigation of the case, inasmuch as no committal had followed the verdict; it is stated that they paid apparently no attention whatsoever to the verdict of the jury, but treated the matter as very much *de novo*, that they committed the individual to Newgate on the charge of manslaughter; does it appear to you that in this proceeding the magistrates deviated in any degree, not only from what was legally their duty, but what was properly and strictly so?—To answer that question some previous statement is necessary, as to my views of the duties of the coroner and the duties of the magistrates, otherwise my answer would not be intelligible. The duties of the coroner and the coroner's jury are to inquire into the cause of the death, or, in other words, to ascertain if it be a case for further inquiry. The oath which is administered to the jury shows such to be the intention, and the inquest is *super visum corporis*; if the body is not forthcoming, the coroner's jury have no power to hold an inquest. The inquiry before the magistrates is, as to the person who has committed the offence; the inquiries thereof are totally distinct, and may be going on at the same time. The coroner's jury appears to me a most useful tribunal for preliminary inquiry as to the cause of death, but a very inefficient one for inquiring as to the guilty party; the coroner himself has no power of committal until the verdict of the jury gives him that power. It frequently happens, indeed almost



almost invariably in cases of excitement, that his inquiry is carried on in the midst of that excitement, and by a class of men not very high in society, for the juries are not of a condition of life which makes them familiar with the law relating to murder and manslaughter, and are forced to abide by the coroner's directions as to the law, if he gives them to them. This is remarkable in this case at Hayes; the verdict of the coroner's jury was wilful murder; the more careful and deliberate examination of the magistrates was a committal for manslaughter; the jury at the Central Criminal Court, when the case was tried by one of the judges of the land, found a verdict of manslaughter, not a verdict of murder. In that particular case, also, if I recollect right (and I believe I have seen the warrant), the warrant of Mr. Wakley was addressed to the magistrates, and ordered them to send the man to Newgate; if this be so, the magistrates did perfectly right in not executing such a warrant, for there was no power to issue such a warrant. Whether, when a man is under the custody of the law, and undergoing an examination of the magistrates, the coroner has the power, upon the verdict of the jury, to order that man to be taken out of the legal custody in which he is, and take him into his own, is a question that I at present should decline to answer positively, though my opinion is, that he has not, and that when a party is once in legal custody, nothing but a *habeas corpus* can transfer him into another custody. I should therefore say, taking the circumstances altogether, there was no disrespect shown to the coroner, or to his office, on the recent occasion, and that the magistrates were right in their view on the subject of the coroner's power.

1632. Mr. *Gally Knight*.] How far do you think it is necessary that the party suspected to have been the cause of death should be present at the coroner's inquest?—Assuming the coroner's inquest to be an inquest for inquiring as to the person who has caused the death, and supposed to be implicated, the party ought to be present; assuming it to be only an inquiry as to the cause of death, he should not. I consider a coroner's inquest to be in principal similar to an inquiry before the grand jury, where the party never is present.

1633. Mr. *Williams*.] Was the party indicted for murder in the case at Hayes?—What he was indicted for I do not know; the question is what he was found guilty of; he would of course be tried on the coroner's inquest for murder.

1634. The committal took place by the magistrates?—It is perfectly immaterial by whom the committal took place; the coroner's inquest was returned, and he must have been tried upon that inquest.

1635. Then he must have been indicted for murder as well as manslaughter?—He must have been tried upon the indictment and upon the coroner's inquest; the form always is, whenever a coroner's inquest has returned a verdict of wilful murder or manslaughter, and there is also an indictment, that, after he is arraigned upon the indictment, the clerk of arraigns says, "You also stand further charged, on the coroner's inquest, with wilful murder," or "manslaughter," as the case may be; "how say you, are you guilty or not guilty?"

1636. *Chairman*.] Would the grand jury have the finding of the coroner's jury before it?—No, only the indictment; the indictment is an inquisition found by the grand jury; the coroner's inquest is an inquisition found by the coroner's jury.

1637. Mr. *Williams*.] You are not aware whether or not the question of murder under the coroner's verdict went to the jury?—It must have done so.

1638. And that the jury gave their verdict upon it?—Yes; and I have no doubt, that being a case of manslaughter, the jury found him not guilty of murder at once; I think it probable the indictment would also be for murder, but I am not certain upon that point.

1639. Colonel *T. Wood*.] What becomes of the inquest; where is that returned?—To the Central Criminal Court.

1640. Mr. *G. Knight*.] You are understood to say, that the coroner has not the power of committing till after the jury have found the verdict?—The coroner's committal is similar in its nature to a bench warrant; the coroner derives his power of committal from the verdict of the coroner's jury; the bench derive their power of committal from the bill found by the grand jury.

1641. *Chairman*.] The Committee would call your attention to another case: It appears that on that occasion the jury on an inquest found a verdict of wilful murder against an individual, and that that individual was committed to Newgate by the warrant of the coroner; in that case it is stated the magistrates

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reflected on the conduct of the coroner, severely censuring it, and also strongly rebuking the constable for not bringing back the prisoner; in that case, do you think the magistrates did or did not deviate from their prescribed path of duty?—As far as respects the censuring the coroner, if such was the case, I think they did, because I do not think that one judge ought to censure the conduct of another judge, unless it be in an official capacity; but as far as the rebuke to the constable went, I think they did right; they would say, “That man was in your custody by our warrant, and you ought not to transfer him to another authority without our authority.”

1642. *Mr. Williams.*] Is it your opinion that Mr. Wakley did on that occasion act illegally?—I think so, subject to my former answer, that I do not conceive if a prisoner be in the custody of legal authority, Mr. Wakley’s warrant has any power to take him out of that legal custody and put him into another; I may be wrong in that opinion, but, as at present advised, that is my view of it.

1643. *Chairman.*] In what way could the coroner carry into execution his warrant, supposing the individual concerned was in the custody of the magistrates?—His warrant is in such a case not necessary; it would be necessary if he was discharged out of custody; he might lodge a warrant with the constable, and say, if he is discharged, detain him under my warrant.

1644. His course would be to transmit his warrant upon the verdict of the jury?—I think his course should be this, that he should make out his warrant, give it to the party in whose custody the prisoner is, in order to his being detained in case he should be discharged out of the magistrates’ custody.

1645. It appears from the evidence, that complaint has been made by the coroner of the magistrates requiring his attendance on the occasion of their going into an inquiry as to the inquests having been duly or unduly held; do you think there was any thing illegal on the part of the magistrates in requiring or requesting such attendance on the part of the coroner?—I understand it has been denied by Mr. Wakley that the committee of magistrates had any right to require his attendance, or compel him to give any information with reference to any subject they then proposed to be inquired into; Mr. Wakley is perfectly correct in that answer, if so given; the committee had no power at all over Mr. Wakley, but the court had; at my suggestion the court is now adjourned to some particular day when the coroners are summoned, so that the oath may be legally administered to them, if necessary. By the Act of the 1st of Victoria, the magistrates are empowered to examine the coroner on oath as to his accounts delivered, and on being satisfied with the correctness thereof, to make an order for payment. The form of the oath now administered is, “You shall true answer make to such questions as the court shall demand of you, touching your accounts now put in;” and under that oath, and under this statute, they have, I conceive, power to ask all those questions which they may deem necessary to come to the conclusion that the accounts are correct. The extent of that inquiry must, as I have said frequently before, depend upon the legal meaning of the word “duly” in the statute of the 26th of George the Second.

1646. You think that the finance committee, though invested with the power of auditing the accounts, could not properly put that oath to the coroner?—They did not attempt to put that oath; they would have had no power to put it.

1647. Then they had no power to summon him?—Certainly not, as a committee; that lay with the court.

1648. In that respect they committed an error?—In that respect they committed an error; but it was a mere error of form, for if Mr. Wakley or Mr. Baker had made any resistance, the committee would have been adjourned, and the inquiry transferred to the court; but they attended the committee and answered the questions which were put to them.

1649. It has been stated by the coroners that disagreeable feelings were excited on their part by being sworn to the accuracy of their accounts, and, after having taken the oath, being examined with respect to the accounts; that being the state of the law, and no blame attaching to the magistrates for carrying that law into effect, do you not think that is sufficient, in the shape of a grievance, to render advisable any alteration in the law on that head?—The whole is founded on a misapprehension; the coroners are not to swear to the correctness of their accounts when they put them in; the coroner is to answer such questions relative to his accounts, after they have been put in, as the court may require, in case, after the accounts are examined, they think any questions necessary; I see no reason  
whatever

whatever for altering the law upon the subject; if the accounts are put in, and they are satisfactory, they are passed; if they are not, the court have the power to ask such questions relative to them as they think right; but the coroner is not first subjected to the oath that his accounts are correct, and then submitted to an examination to ascertain whether his oath was truly given; that I think would be wrong.

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1650. *Mr. Williams.*] If the magistrates were to put this question to the coroner, "will you, upon your oath, state that these accounts are correct?" would he be bound to answer that question?—He would be bound to answer that question; and if no question were propounded beyond that question, I should think that would be a proper question; but if any suspicion at the time existed that the accounts were incorrect, and there was any intention to examine him as to the minute entries in the accounts, I should think no magistrate having such intention would put that general question; I am sure I would not.

1651. *Chairman.*] Supposing that question to have been put in the first instance, and afterwards the magistrates had reason to doubt the accuracy of the accounts, the question would then amount exactly to that before supposed, that the coroner's accounts would be called in question after he had sworn to their accuracy?—Yes; but assuming that question ever to have been put, I think that must have been at the first sessions, before the Act had been properly understood, and the nature of the oath had been properly understood; I had some difficulty in making some of the magistrates understand the intention of the Legislature as to the oath.

1652. *Mr. Williams.*] The magistrates after that could examine him in detail on all or any one of the items of his account if they thought proper to question it?—No doubt they could; and if legislation were to be employed to prevent any improper questions being in any case put, I am afraid it would go to an endless extent.

1653. *Mr. Gally Knight.*] You conceive the true intention of the law to be, that the magistrates should have a certain practical control over the coroner?—I do.

1654. Do you think it is well that that control should continue to exist?—I do; and I think the result of all this investigation into Middlesex shows that a large body of magistrates may be always safely trusted, though there may be some little momentary excitement in which one or two individuals may come into collision with the coroner.

1655. Do you think the circumstance of the magistrates having any control over the coroner would not be likely to interfere with the proper discharge of his duties?—It is impossible to say that; I know no human enactment that is perfect; I know of no system which can be devised which may not be subject to abuse, but to speak practically, I do not think any case in practice will occur where it will interfere with the execution of his duties.

1656. *Chairman.*] You think the provisions of the Act, with regard to the oath, require no alteration, but that it would be better to let the practice gradually assimilate itself to the law?—I see no necessity for any alteration in the oath; I see no necessity for any enactment in any thing relating to it; but I should be very glad to have a legal exposition of the meaning of the word "duly" in that statute.

1657. *Colonel T. Wood.*] Do you consider that there has been any ill feeling arising either from personal or political differences between the body of the Middlesex magistrates and Mr. Wakley?—Most decidedly not; on the contrary, in the inquiries which have been made into the subject of the coroners' fees, and in all the conversations I have had with the magistrates generally upon the subject of remuneration, the impression has been that Mr. Wakley has done his duty properly.

1658. *Mr. Williams.*] Supposing a bad feeling were to exist between the magistrates and the coroner, could not the magistrates, having the power of examining his accounts on oath, as you have described, make it a subject of most unpleasant annoyance to the feelings of the coroner?—The same power exists of annoying the coroner, in case of a personal dispute between the bench and himself, which exists in every other case where one party has to examine another party's accounts, and there is a personal dispute between them.

1659. Do you think it right that the magistrates should have the power of rendering annoyance on such a question to so important an officer as the coroner?—It cannot be *right* that any body should have the power of annoying any body,

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morally speaking; but the *power* of annoyance must always exist where one person has authority over another person; I know of no body of men so little likely to offer personal annoyance to an individual as a large body of magistrates; the question being limited to the unpleasantness which must arise by personal quarrels existing between the party whose accounts are to be examined and the parties who are to examine them, I know no person or set of persons to whom that power could be transferred, where the same evils would not be more likely to arise.

1660. Mr. *G. Knight*.] Is it your opinion that the only judge who is now chosen by popular election should be entirely exempt from all control?—Certainly not; it could not be; there must exist in some quarter the power of examining the accounts.

1661. Where can you place that control, if it be taken out of the hands of the magistrates?—I know not where it could be placed more effectually; I know that where personal feelings interfere in the discharge of any duties, it is in the power of one individual to annoy another.

1662. Can you suggest where it could be placed but with the magistrates?—I cannot.

1663. *Chairman*.] If there were a feeling on the part of an individual magistrate, that ill feeling you think would be completely overruled on the part of the court in the progress of the proceeding?—Assuming, for the purposes of the question, that there was a personal ill feeling between some of the magistrates and the coroner, the result of the ultimate proceedings in these cases is a full answer to that question.

1664. Mr. *Williams*.] Do you think the clerk of the peace would be a proper officer to whom the examination of the coroners' accounts could be referred?—I should think a most improper one.

1665. Have the goodness to state your reasons for that opinion?—The clerk of the peace is an inferior officer to the coroner; the clerk of the peace is almost invariably a lawyer; the coroners are, with one single exception, lawyers; and I should think of all men that could be selected to examine the coroners' accounts, one of the same fraternity as himself in an inferior situation would be the worst.

1666. *Chairman*.] Are all the coroners lawyers, save one?—I cannot answer that question of my own knowledge, but I believe they are.

1667. One of the coroners for the county of Middlesex forms the only exception?—I believe so.

1668. Mr. *Gally Knight*.] Do you think it would be productive of a better state of things if the coroner were appointed by the Crown, and not elected by the people, and had a fixed salary, and was made independent of the magistrates?—As far as election by the Crown is concerned, I think it would be a very beneficial enactment; with respect to the salary, I am not by any means so clear, because the office might sink, in such case, into a mere sinecure; and with respect to taking away the jurisdiction of the magistrates, if the officer were appointed by the Crown and with a salary, I think the jurisdiction of the magistrates might be very safely taken away, but if there was no salary I should doubt.

1669. *Chairman*.] Supposing the substitution of salary for fees, in what way do you suppose the office of coroner could become a mere sinecure; would he not be called upon by the usual process to hold inquests in all cases where it might be necessary?—The coroner is the sole party primarily to judge of the necessity of holding an inquest.

1670. Do you think the effect of the enactment would be such as to induce him through carelessness or idleness to neglect holding inquests where found necessary?—Not in cases where they would be absolutely necessary; but human nature is human nature, and there might not be the same vigilance in making inquiries into all the cases brought before him for inquiry if the salary was fixed.

1671. Would not the coroner be subject to indictment in case of his declining to hold an inquest?—I think it must be a very strong case that would subject him to such a proceeding; practically speaking, I do not think it could be got at.

1672. You think statements such as have been made to the Committee, that the vigilance of the constables has been materially diminished by the deprivation of fees would apply for similar reasons to the substitution of a salary for fees in the payment of the coroner?—I do not see the applicability of the reasoning to the constable; I do not know that it is the duty of the constable to be vigilant in these

these matters, though it is of the coroner; it is the friends, or the parties in the neighbourhood, who are expected to be vigilant.

1673. It has been stated that the vigilance of the constables arose from the fees they received for sending notice to the coroner and summoning the witnesses, and that that vigilance has been diminished in consequence of the amended schedule of the magistrates of Middlesex, and their subsequent order precluding in future the payment of such fees by the coroner?—If the effect of the abolition of those fees has been to prevent any inquest being held which ought to have been held, that schedule ought to be amended immediately; but if the effect has only been to repress that redundancy of vigilance, which looked to the fees rather than the inquests, I see no necessity for its being altered.

1674. *Mr. Williams.*] You have expressed an opinion, that the Crown would be a better source of appointment of the coroner than the present mode of election; has it not been the practice, from very remote ages, to elect the coroner in the same manner as at present, by the votes of the freeholders of the county?—It has; and it has also been the practice to elect other judges in the same manner; but the opinion of every succeeding reign has shown the advantage of making them independent when they are elected, and removing them alike from the influence of the populace and the influence of the Crown.

1675. Are you aware of instances of improper persons being elected by the freeholders to the office of coroner?—That is a question which it would be very invidious in me to answer.

1676. You have expressed an opinion, that the mode of electing one of the most ancient officers in this country, which has existed from remote ages, should be changed; can you state any grounds for that opinion?—If I am asked my opinion in that view, my answer would be, that I think a person who has to preside over a charge of wilful murder should know something of the principles of law and of the rules of evidence.

1677. Do not you think that society, who are the most interested in having proper persons elected to so important an office, would have regard in all instances, as far as their judgment would go, to the election of a proper person?—Of what value can be the judgment of 6,000 men called upon to elect a criminal judge after 10 days' notice?

1678. Do not you think that 6,000 men are as likely to exercise a judgment to their own advantage as the Secretary of State in making the appointment of some person in which he may be influenced by political views or political partisanship?—Whether judicial officers are now selected for political views I know not; but I will not believe that the judges of the land are chosen for those views. I retain my former opinion; if it be the case that judges are chosen from political views and political partisanship, I think it is of very little importance whether they are elected by the Crown or the freeholders.

1679. You must be aware that a great number of valuable appointments are made in this country to serve political views more than the selection of the most proper persons to fill the office?—I do not wish to enter into political discussions, but I can only say, that if ever it occurs that the election of a judicial officer is to serve a political purpose, and not the selection of the best man, I think that is a great abuse, but I by no means say that such is the case.

1680. *Chairman.*] Assuming that the Crown on the one hand, and the general body of electors on the other, may appoint from political motives, is not the responsibility of the Crown far greater than the responsibility distributed among a considerable body of persons; in the one case, whatever might be the political motives, would not there be a greater inducement to look to the qualifications and merits of the individual appointed in the one case than in the other?—There can be no doubt of that; the responsibility, when divided among so many thousands, is no responsibility at all; the responsibility of the minister of the Crown is a very great one; no minister of the Crown could bear up against the impression which would be made on the public mind from a series of improper judicial appointments; but there is this difference also which must be remarked between popular election for political purposes and popular election for judicial purposes; in popular election for political purposes, every man who expresses his own politics, and the larger the number of voters, the stronger will be the expression of the collective political feeling of the particular district; but where the election is for judicial purposes, I would ask what can 6,000 freeholders know of the judicial fitness of a man of whom they have heard, perhaps, for the first time the day that he is a

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candidate; they know a man's political principles from his hand-bill, but a man's judicial fitness is a matter of painful inquiry.

1681. Mr. *Williams*.] Suppose the freeholders were to make choice of an improper person to the office of coroner, is it not in the power of the Lord Chancellor to dismiss him from his office?—Not without cause; however improper the man is, he must go on to act improperly until some case arises which can be laid before the Lord Chancellor.

1682. The assumption that the person is not competent to fill the office, that he is not a proper person, is not sufficient until he has done some act not compatible with the proper discharge of his duty?—Who is able legally to say *à priori* who is a proper man to be chosen coroner? he is to be taken from no particular class of life; there is no qualification required by law; the rule is simply this, that he is to be such person as the freeholders shall elect; this might be perfectly right in a different state of society where there was no medium between the high and the low; but the present varied state of society does appear to me to be quite inconsistent with it.

1683. The power being vested in the Lord Chancellor to remove an improper person, does not that furnish to the public a complete protection against an incompetent person continuing to fill that office, to the detriment of the public?—I do not know that that is nearly so efficient a security as the Lord Chancellor having the power to appoint a proper one.

1684. *Chairman*.] Might not the inefficiency of the person fall short of actual incompetency, and yet not bring him under the cognizance of the Lord Chancellor, it being a sort of stigma to remove a man from an office he is once in, and therefore to be done only as the result of his incapacity being made manifest?—Yes, I think the late coroner for Middlesex was a strong instance of that; he was elected coroner by the freeholders in the vigour of his age, and remained coroner to the age of 91, long after he became unfit from his age.

1685. Mr. *G. Knight*.] He was not removed by the Lord Chancellor?—No; how could the Chancellor remove a man, under such circumstances?

1686. Are you not aware that, in ancient times, many other officers, besides the coroner, were elected by the freeholders?—The sheriffs, I believe, were among those who stood in that situation.

1687. Would you not infer that the argument of his having been elected from very ancient times, is in itself a proof of the propriety of his continuing to be so?—No; for that would be to say that every thing should continue, because it has continued.

1688. Mr. *Williams*.] Do you not think, on the other hand, that many important offices, being in ancient times elected by the people, which are now in the gift of the Crown, that says a great deal for the institution of the coroner, and the ancient mode of electing him being continued?—If I had not found the coroner's office so denuded of all its ancient powers, I should say that.

1689. Mr. *G. Knight*.] You are of opinion that it is from the insignificance of the coroner's office he has been allowed to remain so appointed, more than any other circumstance?—Not the original insignificance of the office, but the insignificance into which it has fallen.

1690. Mr. *Williams*.] Do you think it has fallen into that insignificance from the inability of the persons appointed to uphold its dignity?—I think its duties have become, in a measure, obsolete, that it does not require the same high persons as in former times; and as the office has sunk in estimation, persons have been elected of less consideration, till it has arrived at its present state.

1691. Are you not aware that, in ancient times, besides being the investigator of the cause of violent death, the coroner was a criminal judge, a keeper of the peace of the Crown; that he went circuits, and that, with the sheriff, he, in fact, divided the government of the provinces?—I know that his duties were of a very high nature, though I cannot particularly specify them; circumstances have recently led me to inquire into the office of coroner in the time of Richard II., and I was surprised to see the reference there is made to him at that time.

1692. Then it is more from his having gradually lost from desuetude so many portions of his high office that it is so little like what it was in former times, than from any incompetency in the persons who have filled it?—Certainly; I do not mean to say that incompetent persons have been appointed, or that incompetent persons might not have been appointed by the Crown; but I mean to say that

that in my opinion proper persons are more likely to be appointed by the Crown, than when they are appointed by a large body of freeholders.

1693. *Chairman.*] In the case of the late coroner for Middlesex, his incompetency was overlooked, probably in consequence of the practice, admitted to be illegal, of his holding inquests for a considerable time by deputy?—I do not think that; I was in the commission but a short time before his death, but I should rather say, it was the sort of feeling that they did not like to meddle with an old man who might be removed by death in a month.

1694. *Mr. Williams.*] Did he not hold other appointments under the magistrates of Middlesex up to the latest period of his life?—I believe he did.

1695. Can you state what those appointments were?—Clerk to the committees.

1696. How many committees of the magistrates are there?—That depends on circumstances; there is a committee appointed whenever one is wanted for any purpose; the only standing committee is the committee of accounts and general purposes.

1697. *Colonel Wood.*] Will you state the present form of electing the coroner?—By the freeholders of the county at large.

1698. Is there an efficient control over persons voting who are not freeholders?—No; the only control is that of the poll-clerks and the check-clerks.

1699. How many days may the election last?—I am not certain; in fact, the same evils now exist as to the election of coroners for the county as did exist as to the election of county members; they must all go to one place to vote, and they are subject to tumults and disorders during the whole period of the election.

1700. May it not last 15 days?—I believe it may; it does not appear to me the best mode of election.

1701. Is a contest attended with very heavy expense?—It must be so; I believe, in *Mr. Baker's* case, it amounted to several thousand pounds.

1702. *Mr. Williams.*] Would you require, in the election of a coroner, the adoption of the same means as those adopted in the election of a Member of Parliament, such as dividing the county and concluding the election in two days?—I think that would be a very great improvement, as great an improvement, with reference to the coroner, as it has been with respect to Members for the county.

1703. *Mr. G. Knight.*] But a still greater improvement, in your opinion, would be the appointment of the coroner by the Crown?—Yes, a still greater improvement, especially if independent of the Crown when appointed.

1704. *Chairman.*] Are you not aware that in the mode of election for Members of Parliament very great abuses still remain?—I dare say they do.

1705. Do you suppose that regulations for the election of coroner in a manner similar to that of Members of Parliament could put an end to the abuses in the one case where they have been found insufficient to put an end to them in the other?—My opinion is, that it is not to be expected that they would put an end to them; I do not think placards upon walls, speeches upon the hustings, and those things, are consistent with an election of a judicial officer.

1706. It appears from the evidence taken by the Committee, that a considerable misunderstanding has existed as to the right of *Mr. Higgs*, the coroner of the Duchy of Lancaster, to hold inquests by deputy; a difference of opinion appears to have existed upon that point among the magistrates, and a certain degree of confusion to have consequently arisen; are you able to throw any light upon the proceedings of the magistrates with regard to *Mr. Higgs's* deputyship?—The proceedings upon that subject are as follow: On the day in question, when it was determined to disallow the payments on the inquests taken by deputy, *Mr. Higgs* produced his patent to me, as chairman, to show that he had a right to hold inquests by deputy; he pointed out to me the part of the patent which he said conferred this right upon him; the patent was for three other offices, the names of which I forget, as well as for the coronership; and on reading the part which he pointed out to me, it was to the effect that returns were to be made by his deputy for the other offices (naming them, but omitting the office of coroner); upon which I said, "The very part you have shown me proves that you have no right to appoint a deputy for the office of coroner, for it is expressly limited to the other three offices;" upon that statement the inquests held by deputy by *Mr. Higgs*, as well as by *Mr. Wakley*, were disallowed; and the accounts of both were referred back to the committee to ascertain the number of inquests so held. The next day an officer from the Duchy of Lancaster came to me, and said a

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strange mistake had arisen the day before, for that the patent gave Mr. Higgs the express power of appointing a deputy, and that he had brought a copy of the patent with him. Upon looking to the patent I found it was so. I said, "This is a very extraordinary thing; for in the part Mr. Higgs showed to me, no mention is made of a deputy coroner." He replied, "The part which he has shown you is only of modern introduction, to compel him to make returns for the other three offices, and has not been extended to his office of coroner, because it was not thought necessary." On this explanation being given, I wrote to the committee, informing them of the mistake which had arisen, and sent them a copy of the patent, underscoring that part which plainly gave him the power to appoint a deputy, and recommended to them to allow his inquests, and report to the court; and they did so.

1707. Do you recollect the circumstances which originally drew the attention of the magistrates to the fact of the coroner holding inquests by deputy; was it the recent exercise of that power by Mr. Wakley during his illness at the end of last year and the beginning of this?—I have no knowledge how the question of inquests being held by deputy originally came to the knowledge of the magistrates; I have suspicions as to the mode in which it became known to them, but I have no right to say what those suspicions are.

1708. When the question was brought fairly before the magistrates, do you think that it was impossible for them to act otherwise than they did?—It had been agreed in the committee that the payments should be made, Mr. Wakley having undertaken that no inquest should for the future be held by deputy, and that no notice should be taken in the report; but when it was mentioned to the magistrates in open court that inquests had been taken by deputy, the attention of the court being thereby called to it, it was impossible, in my opinion, for them to pay those fees, though I very much regret that the question was made to have a retrospective effect.

1709. Colonel T. Wood.] Was that decision taken pending this Parliamentary inquiry?—No, previously.

1710. Mr. Williams.] Was that the first occasion on which objection was taken to allowing the expenses of inquests held by deputies?—Certainly.

1711. It is in evidence that Mr. Stirling was in the frequent practice of taking inquests by deputy?—Yes; but there is no evidence, I believe, that that was brought before the court.

1712. The magistrates never took any objection to the payment of those inquests held by Mr. Stirling, Mr. Wakley's predecessor?—No, but they were not the same magistrates; there was not in those days the same strict inquiry made into these things that there is now; my own opinion always has been that it should have been a prospective and not a retrospective order, but when brought before the court, and the court came to know the fact, I think they had no alternative; indeed, I was distinctly asked by the court to state from the chair, whether now that it was brought before them they could legally allow them, and I said they could not.

1713. Chairman.] Have you any explanation to offer on the subject of mileage?—The subject of mileage did not originate with the county of Middlesex, but with the city of Westminster; the opinion of the Attorney-general was taken upon the point, and the sum in Mr. Gell's account, the coroner for Westminster, disallowed; it was in consequence of that that the same rule was adopted in Middlesex, and as it appears to me the question is not whether you pay for a whole mile in a hackney coach when you go only part of one, but whether the 20s. was intended to include the first mile or not. The opinion of the law-officers upon the construction of the statute, with which I most entirely agree, is, that the first mile is intended to be included in the 20s.; therefore, in point of fact, he is paid for the broken distance, because the distance is to be calculated from the end of the first mile, and not from his residence, the intention being that the 20s. should include the going from his house to any distance within a mile; upon any other construction he must have been supposed to hold inquests in his own house.

1714. Have you any statement to make, or any observations you wish to offer to the Committee?—So many of my points have been taken incidentally, that I am not aware whether I have or not. I should wish to state that, since I was examined the last time, I have understood that the money allowed to the constable and jury before the statute of Victoria varied exceedingly in different parishes;



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parishes; in some parishes the jury were allowed 20*s.*, in others only 2*s.*; in some parishes the constable has been allowed 10*s.* 6*d.*, in others only 2*s.*, and that too without reference to the distance from the coroner's house; as, for example, he was allowed 10*s.* 6*d.* from Fulham, and only 6*s.* 8*d.* from Staines. It is perfectly clear, therefore, that the allowance of fees, before the statute of Victoria, was merely arbitrary, according to the custom of the particular parish; and the statute of Victoria was passed for the purpose of ascertaining what was the necessary expense, and forming a schedule of such as should be deemed necessary expenses. It seems to me, therefore, that it is impossible to say, under these circumstances, that the tribunal which was to regulate these fees had not power to disallow the constable's fees altogether, if they thought them unnecessary. Upon what principle, save their opinion of their necessity, are they to regulate them? Are they to take the Fulham or the Staines principle? The 10*s.* 6*d.* or the 2*s.*?

1715. The question partly turned on the ground on which the disallowance of fees to the constable took place; by the Act of Victoria, the payment was charged on the county-rate, and the magistrates prohibited further payments to parochial constables receiving salaries; now those salaries were paid out of the poor-rate; consequently the discontinuance of such allowance arises from the consideration that those constables were already sufficiently paid out of the poor-rate; was not the fact of the recognition of the payment out of the poor-rate tantamount to a direct payment out of the poor-rate?—I cannot understand that reasoning. If I had found that there had been a rate of payment to the constables uniform throughout the county, long established in every parish, I should have had very considerable hesitation in disturbing such a payment; but when it was reserved to the magistrates to legalize that which was before illegal, and to form a schedule of such payments as they shall deem necessary, and they find a variety of inconsistent and arbitrary rates of payments, I cannot see the limitation of their power. It is granted that they may make the payments uniform to all the constables in the county, and denied that they may abolish them altogether, that is to say, that they may reduce those constables who received 10*s.* 6*d.* per inquest to 2*s.* per inquest, but may not reduce those constables who received 2*s.* per inquest to *nil*. What sense or justice is there in such a construction of the statute?

1716. Then you think it quite immaterial to the question, whether the salary of the constable arises from the poor-rate or from any other source?—The salary of the constable does not relate at all to the coroner's inquests; a vast deal has been said about this salary coming from the poor-rate, but the principle upon which the magistrates have decided (whether rightly or wrongly is not for me to say) is this: when a person incurs no expense in consequence of his attendance upon the coroner's inquest he shall receive no pay for it; the principle extends, not only to the salary of beadles, but also to domestic servants; domestic servants are not put to expense by attending before a jury, and therefore no allowance is made; the only point to which I have been directing my reasoning was, the legal right of the justices to disallow constable's fees.

1717. The constable is subject to a certain expense, that expense must be defrayed out of the county-rate, or out of the poor-rate; in the shape of fees in the one case, in the shape of salary in the other; and though not defrayed out of the county-rate in the shape of fees, they are clearly defrayed out of the poor-rate in the shape of salary?—Certainly not, the question is an entire fallacy; the constable incurs no expense; and he will have the same salary every week of the year, whether he summons 52 inquests or none.

1718. Is not the arrangement unfair that the constable should be subject to expenses which it is stated he does incur in the proceedings relative to these inquests?—If the constable is subject to any expense by reason of summoning the jury or attending the inquest, and the expense is not defrayed according to the terms of the schedule, that schedule ought to be amended.

1719. Mr. *Williams*.] Is it your opinion that a fixed payment ought to be made to the parish officers for any trouble they may be put to with regard to inquests, independently of any other emoluments which they receive?—The Act gives no power to the magistrates to make payments for trouble.

1720. That is the law; but I am asking your opinion?—My own opinion is, that every man who performs a duty should have a fair remuneration for it.

1721. Colonel *T. Wood*.] Can you give an opinion as to whether these beadles and constables with salaries should have an additional fee for giving notices?—

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I can give no opinion upon that subject ; I should say it really fairly comes within part of the duties.

1722. *Chairman.*] Have you any further statement to make, in addition to what you have already offered to the Committee?—Yes, I have ; I would further state, that I have understood there has been mentioned to the Committee an extract to the following effect from the Morning Herald : “That upon the report as to mileage having been received, one of the magistrates observed, he hoped the court would look after the coroners, and not allow them to stultify the resolution of the committee by going the longest way round in taking the most distant inquests first. The chairman said, if the coroner did so, it would be a fraud upon the public ; it was not to be expected the court would allow mileage, if the coroner chose to go round Edgeware in order to hold an inquest at Hendon.” That statement is not correct ; I remember the circumstances ; they were these : upon the report being received, one of the magistrates said, “How are we to determine the way the coroner is to go ; he is not to be at liberty to go any way he pleases ;” upon which, one of the magistrates said, “He will go the nearest way ;” another said, “The direct way.” I said, “No, the proper way for him to go is the common and ordinary way ;” upon which some one said, “But suppose he were to go a roundabout way ;” I replied, “I do not suppose the coroner would do that ; but if he choose to go to Hendon by way of Edgeware, it would be a fraud upon the county, and would not be allowed.” But this was mere conversation ; no one imagined that a coroner would do any thing of the kind ; in truth it never could be worth while for him to go roundabout in order to make the distance greater for 9 *d.* a mile.

1723. Have you any thing else to add?—No, I think, nothing else.

1724. Mr. *Wakley.*] As I have not had an opportunity of attending the Committee to-day until now, I wish to call your attention for one moment to question No. 1240 in your former evidence ; at the conclusion of the answer, you say, “The question here is not as to his (that is, the coroner’s) right of holding the inquests, but whether he shall be paid for those he does hold?”—Yes.

1725. Do you mean by that answer to state that the coroner may legally hold inquests when he cannot legally enforce payment for the same?—Yes ; I mean to say that the coroner is such an uncontrolled officer, that he may hold inquests, *de facto*, whensoever he chooses, and the jury must attend, and the witnesses must attend, however needless, vexatious or absurd the inquest may be ; but I do not mean to say that such would be a proper use of his office ; neither do I mean to say that he might not be discharged from his office if he did so. I mean to say, *de facto*, every party would be obliged to attend such inquests, and could not refuse to attend the inquest upon the ground that it was unnecessary.

1726. Do you consider that if he were to hold inquests of that character, it would be a ground for removing him from his office?—Most certainly ; it would be an abuse of his office.

1727. Have you made any resolution at the asylum at Hanwell respecting the office of coroner?—Yes.

1728. Will you state the nature of that resolution?—Directions have been given that in all cases of sudden and violent death information shall be sent to the coroner.

1729. Was that a new resolution?—It was a new resolution, and, I think, a very unnecessary one ; because it appeared to me to be implied common usage and in the nature of things.

1730. When was that resolution adopted?—About a fortnight after you were down there ; after the inquest was held at which I was present.

1731. Was that when I held the two inquests there successively?—Yes.

1732. Was the resolution adopted in consequence of your having considered that the officers were remiss in not having forwarded the requisite notices?—No, certainly not.

1733. Were you aware that notices had not been sent to me from the asylum in the two instances in which inquests had been held in immediate succession?—I am not aware that any notice was ever omitted to be sent which ought to have been sent ; I do not consider it by any means necessary that an inquest should be held upon every person who dies in the asylum.

1734. Are you aware that no inquest had been held in the asylum, notwithstanding you had upwards of 800 patients during a period of more than nine months?—I am not aware that any inquest was necessary during that period.

1735. Do

1735. Do you consider it as necessary that inquests should be taken in lunatic asylums, public and private, in all cases of death?—I do not; and I think the instance of Wakefield having given it up shows it is a mere unnecessary expense. It is quite impossible, guarded as every public asylum is, that cases can arise, other than cases of violent or sudden death, which can make the interference of the coroner necessary.

1736. Do you consider it would be more necessary in private asylums?—I do not know any thing of private asylums; but I have a very strong opinion with respect to private asylums generally, that is to say, I do not think there ought to be any such places; the more I see of the interior of lunatic asylums, the more my opinion becomes strengthened that there ought to be no such thing as a private lunatic asylum for any class of the Queen's subjects.

1737. Whose duty is it to give the coroner notice of a death in a lunatic asylum?—There is no particular officer appointed, but I should say the resident physician; I believe the cases in which inquests were held were these: one was a case where a man had drowned himself, and another case was where a man was found dead in his cell; those were two cases in which inquests were held.

1738. Do you think it should rest with the superintendent, or with the officers of the establishment, whether notice should be given to the coroner or not in cases of death in the asylum?—I do not know who else could give notice; in case of a death, notice is immediately given to the parish, and to the friends of the patient. The rule is this, that immediately upon a death taking place, notice is sent to the parish, and to the patient's friends, and the corpse is buried on the fourth day, if no application be in the meanwhile made to the friends of the deceased for its removal, or by the parish.

1739. *Chairman.*] Would it be desirable that inquests should be invariably held in private lunatic asylums, which are not subject to the jurisdiction of the magistrates?—If there are abuses in private lunatic asylums, I do not think that holding inquests would prevent them.

1740. Does it often occur that the relatives of persons confined in lunatic asylums are willing to know nothing of what passes within the walls?—I know nothing of asylums, practically speaking, excepting Hanwell, and what I learn at Hanwell from patients coming from elsewhere.

*Mr. Thomas William Kilsby, called in; and Examined.*

1741. *Chairman.*] YOU are the keeper of the new prison at Clerkenwell, are you?—I am. *Mr. T. W. Kilsby.*

1742. Have you filled that situation for some time?—For 12 years.

1743. *Mr. Wakley.*] What has been the practice in the new prison at Clerkenwell, with reference to prisoners who have been sent to you by the coroners?—I have had only one instance of a commitment by the coroner previous to yours.

1744. Only one instance of commitment?—Only one.

1745. When was that?—In the year 1829.

1746. Whom was that prisoner committed by?—By the late Mr. Stirling, the then coroner.

1747. Was there any thing peculiar in that case?—It was for a short term of three days.

1748. Was the prisoner sent to you by the coroner and liberated by the coroner?—The prisoner was committed by the coroner to Newgate afterwards; the prisoner was sent up for examination, and afterwards committed to Newgate by the coroner.

1749. Do you recollect what was the charge against the prisoner?—It was a charge of murder.

1750. Is that the only case you recollect, or can find in the books?—That is the only case of the late coroner.

1751. Was that prisoner sent to you in consequence of its being so late in the evening that the police-office was closed?—I think there was something peculiar in it, but I do not recollect at this time what the exact case was.

1752. Did you receive a prisoner from me of the name of Catherine Michal?—I did.

1753. How long was she in your custody?—Three days, I think; it was from Saturday till Tuesday.

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1754. Did

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1754. Did you, on the order of the coroner, send her to the adjourned inquest?—No, she was redelivered to the policeman who brought her.

1755. Was that for attendance at the adjourned inquest?—Yes.

1756. Did the coroner recommit her to the new prison?—He did.

1757. Did you refuse to receive her?—I did.

1758. Can you state the grounds on which that refusal was made?—The ground of the refusal was, the strong opinion expressed by the visiting magistrates and the chairman of the sessions, that the coroner could not commit to that prison any prisoner whose case was under consideration by an adjourned inquest.

1759. Were you directed by the visiting justices, in consequence, not to receive a prisoner again under similar circumstances?—I had no written directions; this happened to be reported to them on the Monday, which was their meeting day; it was also the day of the quarter sessions, and it was mentioned in court, and the chairman intimated to me his opinion very strongly, that they could not be received there, and that I was not justified in receiving a prisoner under those circumstances.

1760. Then you had no written instructions from the justices, requiring that you should not take in prisoners who were committed by the coroner?—None at all.

1761. But in consequence of the intimation which was made to you by the chairman of the sessions, you considered that it was not your duty to receive a prisoner if again committed by the coroner?—Just so.

1762. That is at an adjourned inquest?—Yes.

1763. Was the objection only made with reference to the adjourned inquest?—I understood so at the time.

*Jovis, 23<sup>a</sup> die Julii, 1840.*

## MEMBERS PRESENT:

Mr. Gally Knight.  
Mr. Wakley.  
Mr. T. S. Duncombe.  
Mr. Williams.

Mr. Aglionby.  
Lord Eliot.  
Colonel T. Wood.

## LORD TEIGNMOUTH IN THE CHAIR.

*Thomas Wakley, Esq., a Member of the Committee, further Examined.*

T. Wakley, Esq.  
M. P.

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1764. *Chairman.*] HAVE you any statement to offer on any points connected with the subject-matter of this examination?—At the last meeting of the Committee I was not present until immediately preceding the close of the proceedings, and consequently I had not the advantage of hearing the examination of Mr. Serjeant Adams. In answer to question 1631, Mr. Serjeant Adams stated, that the duties of the coroner, and the coroner's jury, are to inquire into the cause of death, or, in other words, to see whether it is a case for further inquiry. Then he goes on to say, "The inquiry before the magistrates is, as to the person who has committed the offence; the inquiries therefore are totally distinct, and may be going on at the same time." Then, in answer to question 1640, he stated, "The power of the coroner to commit is similar in its nature to a bench-warrant; he derives his power of committal from the verdict of the coroner's jury;" and in reply to question 1642, he stated that he was of opinion that the coroner had acted illegally in committing a person at Harefield, against whom a verdict of wilful murder was returned, because that person had previously been before the magistrates. Now, I wish to refer the Committee to the particular statute under which the coroner exercises his functions, which statute is the 4th of Edward the First; the words are these, "And how many soever be found culpable by inquisition

sition in any manner aforesaid, they shall be taken and delivered to the sheriff, and shall be committed to gaol." I contend, therefore, that by the words of this statute, the jury having found the person who was before me and in my custody guilty of wilful murder, I had no discretion, but that I was bound by the words of the statute to commit the party to gaol for trial; and it is impossible to discover what injury the course of public justice could sustain by such a procedure; because the party being committed for trial upon the charge of wilful murder, the grand jury may afterwards, when the indictment is preferred, ignore the bill for wilful murder, and find a bill only for manslaughter; and even after that, if the party be tried upon the coroner's inquisition on the charge of murder, the jury then on the trial are able to find him guilty only of manslaughter, if they think fit; therefore it does appear to me that the proceeding, with reference to both law and practice, which I adopted was strictly correct; that I had no course to pursue, but to commit the party when the jury had found a verdict of wilful murder against him; and, further, I had the experience of the case which occurred at Hayes, where an expense of 53*l.* 15*s.* was incurred by the county, in consequence of the second inquiry which took place before the magistrates. The jury on the occasion of that inquest, consisting of the most respectable men in the neighbourhood of Hayes, embracing a barrister of note, Mr. Chadwick Jones, having returned a verdict of wilful murder, it did not appear to me that it was necessary for the magistrates to institute a second inquiry, though I most willingly admit that it was strictly legal for them to go into the investigation. Mr. Serjeant Adams has spoken of the more mature investigation before the magistrates; I can only state, that the inquiry before the coroner occupied two entire days, and was as patiently conducted as any investigation that ever took place in any court.

*T. Wakley, Esq.*  
M. P.

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1765. *Mr. Aglionby.*] Are your observations intended to apply to this particular case, or do you consider it in general expedient, that the inquiry before the coroner should supersede and take the place of any inquiry before the magistrates?—My own opinion is, that if the inquiry before the coroner be conducted as it ought to be conducted, such inquiry before the magistrates is wholly unnecessary; and, in my own practice, since I have been coroner, there have been parties convicted of murder where there was no examination before magistrates. In the case of Marchant, at Cadogan-place, who committed a murder in the house of one of the magistrates of this county, the lad was committed to Newgate by me; he was never in the custody of a magistrate at all; he was tried for the offence; he was convicted, and he was executed. In the case of Catherine Michall, who destroyed her child by causing laudanum to be administered to it, she was not at all in the custody of the magistrates; the inquiry was wholly conducted by me; she was first of all taken into custody by my order; she was remanded, and brought before the inquest, an adjourned inquest; and she was afterwards committed for trial, found guilty, and sentenced to death.

1766. Your position comes to this, that if the coroner commits a man, either for murder or manslaughter, you consider that there is no necessity for the magistrates to inquire?—Certainly.

1767. Supposing there was evidence brought before you which justified you in committing a man for manslaughter, and at a subsequent period further evidence came out, and the magistrates investigated that evidence, and thought him guilty of murder, in that event they would have a right to commit him for the murder; and referring to the argument you have used as to the little injury done to a man by committing him for murder, as he might on his trial be found guilty of manslaughter, what injury could accrue to justice from allowing that man to be committed for murder by the magistrates on subsequent inquiry?—It is not difficult to state what injury might arise from it, further than the expense that would accrue to the county. In the case at Hayes, although the coroner's jury returned a verdict of wilful murder, the magistrates committed for manslaughter; and in that case, so far as they could, they damaged the deliberate finding of the jury on the inquest, and their decision had a tendency to nullify and set aside the soundness of the decision of the jury. If a party before the coroner be found guilty of manslaughter, and be committed for manslaughter, if evidence should arise afterwards which should be brought before the court, showing more clearly what was actually the nature of the crime which had been committed, there is nothing to prevent a party from being indicted for murder after he has been

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committed by the coroner for manslaughter, without any additional inquiry before the magistrates; no additional inquiry before the magistrates is necessary to cause him to be tried for that crime.

1768. Still adverting to the general principle which you seem to maintain, is it likely to defeat the ends of justice, that there should be a subsequent tribunal, that of the magistrates, to commit even after the coroner's verdict has been given?—The office of coroner was in existence many hundred years before justices of the peace were appointed; and it does not appear, from the records that I have been able to examine, that there was any further power required than the power which the coroner could exercise in such cases; he could apprehend persons, he could bring them before the inquest, and on the finding of the jury he could commit them, either for murder or manslaughter, to take their trial under those circumstances; I do not see the utility of the subsequent examination before the magistrates.

1769. *Chairman.*] You have stated that in the case of the inquest at Hayes, your conduct was severely censured, and the constable reprimanded; what was the ground of that censure?—The ground of the censure was, that the coroner had committed a person whom the magistrates had first seen, and had not given them an opportunity of having the prisoner before them a second time.

1770. Was the prisoner in the custody of the magistrates at the time?—To the best of my recollection, the prisoner had undergone no examination before the magistrates, but he had been in the custody of their officer, the high-constable of Uxbridge, who, as a peace-officer, might be called into action for the preservation of the peace, by either the coroner or the magistrates. It did not appear to me that the magistrates individually could receive any benefit by having the party in custody, and consequently it did not seem that they could sustain any loss by my acting on the 4th of Edward the First, and committing him to prison so soon as the jury had found him guilty; and it did appear to me, that if I had not committed him, I should have been acting decidedly contrary to law; in fact, that if I had not, I should not have fulfilled the obligations the law had imposed upon me.

1771. Allowing you were fully justified by the law in committing a person to prison on the verdict of the jury, and that in that case the magistrates had no power whatever to interfere with your warrant, do you think that the coroner had power to interfere with the warrant of the magistrates, and to take by his warrant that prisoner out of the hands of the magistrates?—That is a question which I cannot very positively answer. In the case at Hayes, so soon as the verdict was returned, as I was so new in my office, I directed the clerk to act for me in making out the warrant, precisely as he had done for Mr. Stirling during 15 preceding years; he said he would do so. On procuring the warrant and filling it up, I found it was a warrant for the apprehension and not for the committal of the accused person; I said, "It appears to me that this is wrong;" his answer was, that it had been the invariable practice to issue warrants of that kind, and that there never had been a difficulty respecting it, and that as soon as the magistrates saw upon the face of the warrant that the party had been found guilty of wilful murder, they would at once commit him to take his trial.

1772. The point to which that question referred, seems to be just that on which you are at issue with Mr. Serjeant Adams, he holding that you could not interfere with the warrant of the magistrates, and you expressing a doubt upon that point. If then the magistrates did not go beyond the administering a rebuke to the constable, what possible ground of complaint had you against the magistrates, unless you felt assured that they had expressed themselves in terms disparaging to your office?—I fear that your lordship is not drawing the necessary distinction between the two cases; the one case occurred at Hayes, the other at Harefield; in both cases a verdict of wilful murder was returned; in the one case, the person was in my custody, in the other, he was not.

1773. Mr. Serjeant Adams's examination referred to a case in which the prisoner was in the custody of the magistrates; admitting, as you do, that the magistrates acted in that case in conformity with the law, and supposing there was nothing in the censure of the magistrates that reflected any disparagement whatever on your office, is there any imputation on the conduct of the magistrates?—I consider that the censure of the magistrates on the conduct of the coroner, and the rebuke to the constables, were not called for; a verdict had been returned against the party, his person had been secured, and he was about to be tried.

1774. What

1774. What evidence have you of the censure, beyond the report in the newspaper?—No further than the report in the newspaper, and the report of the constable.

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1775. Are you not aware that Mr. Serjeant Adams proved most distinctly, that, in another case, the newspaper report was perfectly erroneous, and that the interpretation put upon his expressions was unfounded; and do you think that on the information you possessed with regard to the censure, from the paragraph in the "*Morning Herald*," you were entitled to consider that the magistrates had administered a censure to you in a manner disparaging to your office?—I had the statement from the constable, as well as the report in the newspaper.

1776. Can you state the terms of the censure?—I have been told that they expressed very great anger, and insisted on the constable producing the prisoner, calling for him again and again in court, and alleging that it had been most improper for him to be committed.

1777. The magistrates appear to have done nothing more, so far as appears from your evidence, than vindicate their own authority from the interposition of an authority which they appear to have legally denied?—The coroner who acted on that occasion now refers the Committee to the express terms of the statute, wherein he is directed, on a party before him being found guilty of the offence named, to commit that party to gaol for trial.

1778. Does the statute suppose the case of a prisoner being already in the custody of other parties?—No; at the time that that statute was passed, the office of justice of the peace had no existence.

1779. Then is it not clear that that statute is inapplicable to the particular case in question?—I think that it is strictly applicable.

1780. Does not that statute suppose the party to be not in custody; and do you think that by any interpretation of that statute you could at once prejudge and decide upon the question at issue between yourself and the magistrates, when the magistrates appear, from other evidence and from your own admission, to have acted legally?—I do not consider that I was required at all to take into account any thing that the magistrates had done; the party was brought before me by the constable of the parish; he was present during the inquest; he was in the custody of the peace-officer of the Crown; the jury had found him guilty of wilful murder; I had only to comply with the express words of the statute, and commit him at once to gaol for trial.

1781. When the question was just now put, whether you had a right to commit the prisoner, he being at the time in the custody of the magistrates, you expressed a doubt upon that point; you now conceive you were authorized by the statute to take the course which the magistrates on that occasion objected to?—My former answer referred to the case which occurred at Hayes, where the party was not brought before me at all, but was all the while in the custody of the magistrates at Uxbridge; I did not see the prisoner; when he was found guilty he was absent.

1782. The questions put have all referred to that particular case?—I could not commit that party for trial from my court, because he was not in my court; I might have made out a warrant for his committal, and addressed it to the magistrates, but I could not commit him, for I had not got him.

1783. *Mr. Williams.*] An opinion has been expressed in evidence given before this Committee, that the coroner has no power of committing, excepting after the verdict against the party accused has been given by the coroner's jury; is that opinion correct?—I must first ascertain what is meant by the word committal; the coroner has the power of taking a person into custody, and keeping a person in custody until the verdict of the jury is returned, and then to commit for trial; but in no case where he holds an inquest on a dead body can he, or does he, ever think of committing for trial unless he has the verdict of the jury to sanction such a proceeding.

1784. He might, you say, have detained the party accused?—He might have taken the party into custody, and remanded him for the purposes of the inquest, which may be compared with a committal for re-examination or reproduction at the inquest. I observe in one of the answers of Mr. Serjeant Adams, in reply to question 1632, wherein he was asked, "How far do you think it is necessary that the party suspected to have been the cause of death should be present at the



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coroner's inquest?" that he said, "Assuming the coroner's inquest to be an inquest for inquiring as to the person who has caused the death and is supposed to be implicated, the party ought to be present; assuming it to be only an inquiry why the cause of death should be inquired into, he should not; it is similar to an inquiry before the grand jury, where the party never is present." It appears to me, that if the coroner is merely to ascertain how the death has occurred, and to institute no inquiry as to the person who inflicted the wound, he might as well not sit at all; but the provisions of the statute of Edward are express and distinct upon this point; it states that after the jury are assembled, "the coroner, upon the oath of them, shall inquire in this manner; that is to wit, if they know where the person was slain, whether it were in any field, house, bed, tavern, or company, and who were there; likewise it is to be inquired who were culpable, and how far either of the act or of the force, and who were present, either men or women, of what age soever they be; and so many as be found culpable by the inquest in any of the manners aforesaid, they shall be taken and delivered to the sheriff, and shall be committed to gaol." There cannot, therefore, if any one refers to this statute, which is still in existence, and regulates the coroner's office, be two opinions upon the subject.

1785. Mr. Aglionby.] Is it not the practice in Middlesex and other counties, in cases where the coroner's jury has found a verdict of guilty in the absence of the party accused, and on which inquisition the coroner has made out his warrant of committal, that the magistrates also take an examination of the party accused in his presence, and commit him for trial on their warrant?—I understand from Mr. Bell, who acts as clerk to me, and was clerk for so many years to Mr. Stirling, that a difference of practice in this county has existed on that subject; that in some cases the magistrates on receiving the warrant of the coroner committed the party as soon as he was identified before them, without instituting another inquiry; but that other magistrates in other cases examined witnesses and went into a re-investigation, considering that they were called upon to do so, and to act not upon the coroner's warrant but upon their own examination.

1786. As you have expressed some opinions on the law respecting the proceedings of the coroner in such cases, which of those practices do you deem the correct one?—My own opinion is, that it is the proper practice for the magistrates to commit on the warrant of the coroner, without instituting an additional inquiry, unless it be in a case where a verdict of manslaughter has been returned, and that additional evidence may be forthcoming to the magistrates, to show that the accused party has been guilty of the crime of murder.

1787. Would not this anomaly be productive of great disadvantage to the prisoner, that as in all cases of felony the prisoner must hear the examinations of the witnesses in his presence, in the case contemplated of previous inquiry by the coroner, the prisoner would be deprived of that advantage altogether?—No; my practice invariably is, as soon as I find an accusation to arise against any person, to desist in my inquiry until I have had the accused party before me, if he is to be found, or there is a reasonable expectation of finding him in the course of a few days; and in no instance have I of late proceeded to terminate my inquiry without giving him the fullest opportunity of hearing every thing which is alleged against him in the case, and affording him the amplest opportunity of answering the charge.

1788. Is not that practice rather at variance with the clause you have read, as proving a certain position from the statute of Edward the First; nothing is said in that clause as to requiring the party to be present?—No, nothing is said there of requiring the party to be present, further than relates to the direction that the coroner shall take him into custody, and shall commit him to gaol if he be found guilty.

1789. Is not that after the inquiry, and not before the inquiry?—My opinion is, that it refers to the previous period as well as the ulterior period; for if the coroner had not the power of taking the suspected person into custody, his proceedings would be merely an advertisement to the culprit, and an announcement that he was likely to be accused; and, if the accused was speedy in his movements, he might escape the ends of justice.

1790. Are you to be understood, that on a *prima facie* case made out against an individual not in custody, you adjourn the meeting, suspend the inquiry, and in the

the mean time grant a warrant to apprehend the party, and bring him before you? --Yes; if there be a sufficient ground to justify it in the proceedings, I never hesitate to adopt that course.

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1791. And your inquisition is not completed and signed until the party has been brought before you, and the evidence given in his presence?—That is precisely the course I pursue.

1792. In one of the cases you have referred to, the practice of the magistrates has been to examine into the case and take fresh evidence, and in the other, to act on the verdict of the coroner's jury; in either of those cases is an indictment preferred before the grand jury in addition to the inquisition returned by the coroner?—In all the cases.

1793. Before whom would the depositions be laid?—Before the court where the prisoner was to be tried.

1794. You are aware that on the back of the indictment there is a list of the witnesses on whose evidence the charge is to be substantiated; by whom would the witnesses be selected?—The selection is made by the clerk of the court, in communication with the person who is bound over to prosecute.

1795. Can you inform the Committee whether the indictment in the case referred to is a mere copy of the inquisition returned by the coroner, or a separate legal document?—A separate legal document, drawn up by the clerk of the court, or an officer appointed for that purpose.

1796. On which is the prisoner arraigned in the first instance?—Invariably on the indictment.

1797. Colonel *T. Wood.*] You mean that the clerk of arraigns collects the depositions taken at the coroner's inquest?—No; the depositions are sent to the court from the coroner, and then the clerk prepares his indictment in conformity with those depositions.

1798. Lord *Eliot.*] Precisely as if those depositions had been made before the magistrates?—Exactly.

1799. Mr. *Gally Knight.*] You do not mean to say, that as the law now stands, the magistrates, if they think it necessary, have not a right to go into the case again after it has been before the coroner?—I do not question their right in the least.

1800. But you do not see the necessity for it?—Just so.

1801. Colonel *T. Wood.*] Do you conceive it to be legal that the clerk of arraigns shall extract from the coroner's proceedings certain depositions, and shall lay them before the grand jury and prefer an indictment upon them?—No; he does not extract the depositions or any portion of them, but having read the depositions, he frames the indictment in conformity with the facts which he considers to be proved in the depositions, and then on the back of the indictment he endorses the names of the witnesses who are supposed to be capable of proving the case.

1802. To render the verdict of the grand jury valid, the depositions themselves must be laid before the grand jury?—They are at perfect liberty to call for them, and I believe they have them frequently.

1803. Lord *Eliot.*] Are they submitted to the judge?—Yes.

1804. Colonel *T. Wood.*] How is it consistent with the practice, that when a party is tried upon a verdict of a coroner's jury, no indictment is preferred before the grand jury, but he is tried on the inquisition?—Although the jury have returned a verdict against the party in the coroner's court, a distinct indictment is preferred against the prisoner in all cases.

1805. Cannot the party be tried upon a coroner's inquisition without an indictment being preferred before the grand jury?—Yes; if the grand jury should ignore the bill of indictment, then the party is tried on the coroner's inquisition.

1806. Do you consider it legal, in the first place, to prefer an indictment on the depositions taken before the coroner's jury, and in the event of the grand jury ignoring the bill, then that it is legal to try the party on the coroner's inquisition?—That is the practice.

1807. Do you conceive that to be legal?—That is the lawful practice.

1808. And the general practice throughout the country?—Yes; I do not think there is a variation from it any where.

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1809. Can you name any particular cases in this county in which no examination has taken place before the magistrates, but the party having been committed on the coroner's warrant, a bill of indictment has been preferred on depositions taken before the coroner, and that bill found by the grand jury?—No such case has come before me; but this case occurred the other day: a woman was charged before me with having caused the death of her child, by starving it; the jury found her guilty of manslaughter; and she was committed by me on the charge of manslaughter; but the parochial authorities afterwards preferred a bill against her for murder; that bill, however, was ignored, and she was found guilty of manslaughter.

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## APPENDIX.

A TABULAR ANALYSIS of the RETURNS from the several COUNTIES, &c. of the ALLOWANCES made to CONSTABLES, JURIES, WITNESSES, &c., according to the Schedules established under the Act of 1 Vict., c. 68.

COUNTIES, &c.	CONSTABLES.				JURIES.			—	WITNESSES.			
	Constable attending Coroner with Notice of Death.	Mileage, in Addition for each Mile.	Constable summoning Jury and Witnesses.	Mileage, (additional) out and home.	Allowance to each Jurymen singly.	Use of Room for Inquest, not exceeding	Use of Room for Body, not exceeding		Allowance to each.	Addition for Mileage.	Finding a Body, and Notice.	Washing Body.
ENGLAND:	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.		£. s. d.	s. d.	s. d.	s. d.
Bedfordshire - - -	2 6	- 6	5 -	- -	1 -	- -	- -	- -	- 2 -			
Berks - - - - -	- 6	- -	5 -	- 6	1 -	5 -	- -	- -	{ - allowed according to time and circumstances.			
Bucks - - - - -	- 6	- -	{ 5 - 1 - }	- 6	1 -	{ 5 - and for dead body 5 - }	- -	- -	- 3 -	{ - 6 exceeds 6 miles.		
Cambridge - - -	2 6	- 6	{ 5 - 1 - }	{ extra for 3 hours	1 -	- -	5 -	- -	- 3 -	- 6		
Chester - - - -	- 6	- 6	2 6	ditto	- -	- -	5 -	- -	- -			
Cornwall - - -	- 6	- 3	2 6	- 6	1 -	2 6	- -	- -	- 1 -			
Parishes in Country -	- -	- 6	5 -	- -	- -	- -	- -	- -	- -			
Cumberland - - -	2 6	- 3	2 6	- -	- 5	{ 6 - add <sup>l</sup> day 2 9 }	- -	- -	- 2 6	- 3		
Derby - - - - -	2 6	- 6	6 -	- -	{ 2 - add <sup>l</sup> car }	5 -	- -	- -	- 10 6	profess <sup>l</sup> .		
Dorset - - - - -	- -	- 4	{ 2 - 2 6 }	- 4	- 8	5 -	5 -	- -	- 6	- 3	5 -	
Durham - - - -	3 -	- 6	3 6	- -	- 8	{ 5 - add <sup>l</sup> day 5 - }	- -	profess <sup>l</sup>	- 3 - 1 1 -	- 6 1 -		
Essex - - - - -	- -	- 3	{ 5 - 6 - }	- -	- -	5 -	- -	- -	- 2 -	- 3		
Gloucester - - -	5 -	{ - 4 to prison - 10 }	5 -	- 4	- 8	{ 10 - add <sup>l</sup> day 5 - }	- -	- -	- 2 6			
Hants - - - - -	{ no schedule. All payments made at the discretion of the coroner.					{ 5 - ditto }	- -	{ yeoman or farmer - }	- 1 6 - 3 -			
Hereford - - -	2 6	- 6	- -	- 6	- -	5 -	- -	- -	- 2 6			
Hertford - - -	2 6	- -	{ 5 - adja 2 6 }	- -	- -	5 -	- -	- -	- 2 6			
St. Alban's Liberty -	5 -	- -	- -	- -	- -	3 -	2 6	- -	- 2 6			
Huntingdon - - -	1 -	- 4	{ 2 6 }	- 4	1 -	5 -	- -	- -	- 1 -			
Kent - - - - -	2 6	- 4	5 -	- -	- -	5 -	5 -	- -	- 1 -			
Lancaster - - -	- -	- -	- -	- -	- -	3 6	- -	- -	- 2 6	{ 3 6 5 -		
Leicester - - -	2 6	- 6	5 -	- -	- -	5 -	- -	- -	- 2 6	- 6		
Lincoln - - - -	2 6	{ - 6 above 10 miles - 9 }	5 6	- -	{ in town 1 - out 2 - }	5 -	5 -	- -	- 1 -			
Kesteven - - -	{ 2 6 1 6 }	{ - 6 - 9 }	- -	- -	1 -	5 -	- -	- -	- 2 - - 1 - - 2 -	- -	5 -	
Lindsey - - - -	2 6	{ - 6 - 9 }	- -	- -	1 -	7 -	- -	- -	- 1 - - 2 -			
Middlesex - - -	1 -	{ - adj <sup>t</sup>	6 6 3 6 }	- -	- -	5 -	5 -	- -	- 1 -	{ per hour - 3 not ex <sup>d</sup> 3 h. - 6 }	4 -	
No payment in this County to Police Constables, or Parochial Constables or Officers receiving regular salaries or wages, or to any Constable, when there is a salaried Constable or Officer in the Parish.												
City of Westminster -	1 -	{ - adj <sup>t</sup>	6 6 3 6 }	- -	- -	{ 5 - extra 7 6 }	5 -	- -	- -	- -	4 -	
Monmouth - - -	- -	- -	{ 3 - 2 6 }	- 4	1 -	5 -	- -	- -	- 1 -			
Norfolk - - - -	2 6	- 6	- -	- -	- -	12 -	- -	- -	- 2 -	- 3	2 -	
Northampton - - -	1 -	- -	5 -	- -	1 -	5 -	- -	- -	{ - 2 6 - 5 - above la- bourer }	- 6		
Northumberland - - -	{ no schedule. All the payments made at the discretion of the coroner.			{ 1 - each }	- -	- -	- -	- -	- -	- -		
Nottingham - - -	1 -	- 6	{ 3 - }	- -	2 -	- -	- -	- -	- 1 6	- -	- -	4 -

RETURNS from the several Counties, &c. of the Allowances made to Constables, Juries, Witnesses, &c.—*continued.*

COUNTIES, &c.	CONSTABLES.				JURIES.			—	WITNESSES.			
	Constable attending Coroner with Notice of Death.	Mileage, in addition for each Mile.	Constable summoning Jury and Witnesses.	Mileage (additional) out and home.	Allowance to each Jurymen singly.	Use of Room for Inquest.	Use of Room for Body.		Allowance to each.	Addition for Mileage.	Finding a Body, and Notice.	Washing Body.
ENGLAND— <i>continued.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>£. s. d.</i>		<i>£. s. d.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>
Oxford - - -	1 -	- -	{ 7 6 3 6 adj <sup>d</sup> }	- -	- 8	2 6	6	- -	- 3 -	- -	- -	4 -
Rutland - - -	2 -	- 3	6 -	- -	1 -	5 -	- -	{ Profess <sup>l</sup>	- 3 - 1 1 -	- 3	- -	- -
Salop - - -	- -	- 3	2 6	- -	1 -	5 -	- -	- -	- -	- -	- -	- -
Stafford - - -	2 6	- 6	6 6	- 3	1 -	2 6	- -	- -	- 2 6	- 6	- -	- -
Suffolk :												
Beccles - - -	1 -	- -	{ 6 6 3 6 adj <sup>d</sup> }	- -	1 -	{ 5 - 6 hrs. 7 6 }	- 5 -	- -	- 1 -	- 3	4 -	- -
Woodbridge - - -	2 6	- -	{ 6 6 3 6 }	- -	1 -	{ 5 - 7 6 }	- 5 -	- -	- 1 -	- 3	4 -	- -
Ipswich - - -	1 -	- -	{ 6 6 3 6 }	- -	- -	{ 5 - 7 6 }	- 10 -	- -	- 1 -	- 3	4 -	- -
Bury - - -	1 -	- -	{ 6 6 3 6 }	- -	1 -	{ 5 - 7 6 }	- 5 -	- -	- 1 -	- 3	4 -	- -
Surrey - - -	2 -	- 3	{ 6 - 2 6 adj <sup>d</sup> }	- -	1 -	7 6	- -	- -	- 2 6	- 3	3 -	- -
Sussex - - -	2 6	- 3	5 -	- 3	- -	5 -	- -	- -	- 1 -	- 3	{ 2 - each night }	- -
Warwick - - -	{ 3 6 - 6 }	- 4	5 -	- -	{ 1 6 3 4 non-read <sup>t</sup> }	5 -	1 -	{ - profess <sup>l</sup>	- 5 - 2 2 -	- 4	7 6	- -
Westmorland - - -	2 6	- 4	- -	- -	- -	3 6	- -	{ - long dist	- 2 6 - 5 -	- -	- -	- -
Wilts - - -	- -	- 3	7 -	- -	1 -	5 -	- 2 6	- -	- -	- 3	- -	- -
Worcester - - -	- -	- 4	10 -	- -	1 -	5 -	- -	- -	- -	- -	- -	- -
York :												
East Riding - - -	1 -	- 6	3 -	- -	1 -	5 -	- 2 6	- -	- 3 6	- -	5 -	- -
North Riding - - -	1 -	- 6	4 -	- -	1 -	5 -	- -	- -	- 6	- -	- -	- -
West Riding - - -	1 -	- 6	2 6	- 6	- -	5 -	- 5 -	- -	- 2 6	- 6	- -	- -
Ripon Liberty - - -	- -	- -	5 -	- 8	{ 1 - 2 6 }	5 -	- 5 -	- -	- -	- -	5 -	- -
WALES :												
Brecon - - -	2 6	- 4	{ 5 - 2 6 }	- -	- -	{ 10 - 3 6 adjourn <sup>t</sup> }	- -	- -	- -	- -	- -	- -
Cardigan - - -	1 -	- 3	2 6	- 3	1 -	5 -	- -	{ labourer mechanic farmer auction <sup>r</sup>	- 1 6 - 3 - - 5 - - 10 -	- -	{ 5 - 10 - 15 - }	5 -
Carmarthen - - -	1 -	- -	{ 2 - 3 4 5 - }	- -	1 -	5 -	- -	{ labourer mechanic farmer profess <sup>l</sup>	- 3 - 4 - - 7 - 1 1 -	- -	<i>£. s. d.</i> 1 - -	5 -
Carnarvon - - -	- -	6	2 6	- -	- -	- -	- -	- -	discretion <sup>al</sup>	- 6	- -	- -
Denbigh - - -	- -	- 4	4 6	- -	- -	- -	- -	- -	- -	- -	- -	- -
Flint - - -	2 6	- 6	- -	- -	- -	- -	- -	- -	- 2 6	- 6	- 3 6	- -
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Merioneth - - -	2 6	{ - 6 - 8 }	- -	- -	- -	{ 5 - each day }	- -	{ labourer farmer profess <sup>l</sup>	- 1 6 - 3 - 1 1 -	- -	- -	- -
Montgomery - - -	2 6	{ - 6 each day }	- -	- -	- -	{ 5 - each day }	- -	{ labourer yeoman profess <sup>l</sup>	- 1 6 - 3 - 1 1 -	- -	- -	- -
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*Central Criminal Court.* Form of proceeding at the Central Criminal Court when a party stands charged with manslaughter in the indictment, and with wilful murder and manslaughter on the coroner's inquest, *Adams* 1635.

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*Clerk of the Peace.* Proposal for submitting the coroners' accounts for audit to the clerk of the peace instead of the magistrates, *Wakley* 1493–1496—Objection to this arrangement, *Adams* 1664–1667.

*Clerk to the Coroner.* On witness's appointment he engaged Mr. Bell, who had been Mr. Stirling's clerk for 15 years, and instructed him to act as before, *Wakley* 1141–1143.

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*Coleman, Henry.* Case of the inquest held upon the boy Coleman, at Hendon, *Laurie* 921–932, 960; *Adams* 1236, 1289, 1290—Number of magistrates present when the expense of the inquest on Coleman was disallowed, *ib.* 1304—Similarity of the case of Coleman to the case given in East's Reports, upon which the action of *The King v. The Justices of Kent* was founded, *ib.* 1288—Opinion with respect to the inquest on Coleman being duly held or not, *ib.* 1248, 1260—Occasion of fees and costs of that inquest being disallowed for several months, *ib.* 1237—Part taken by witness in this case, *ib.* 1260.

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**Committees of Magistrates.** How the appointment of committees of magistrates to superintend prisons, &c. is regulated in the county of Middlesex, *Laurie* 978.

**Complaints.** Frequency of complaints from Mr. Baker's district of constables being deprived of their expenses when attending inquests, *Laurie* 905—No complaint has been made to the Middlesex magistrates of any inconvenience from the non-payment of fees to constables, *Adams* 1377.

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**Coroners.** A coroner may often be brought into collision with magistrates in holding inquests in prisons, &c.; the superior courts would prevent his being improperly overruled by them, *Baker* 283–288—Power of coroners to refuse to hold inquests, *Laurie* 934—Advantages of a legal practitioner for coroner over a medical coroner, *ib.* 1036–1052—Necessity for some degree of control being exercised over the coroner by the magistrates, *Adams* 1205—It is inadvisable to make any change in the present law without the whole office of coroner is to be revised, *ib.* 1239—A coroner may be punished by the superior courts for misconduct, *Wakley* 1471–1473.

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*County Lunatic Asylum.* In whom the superintendence and control of the County of Middlesex Asylum is vested, *Laurie* 972—Regulation at the Hanwell Lunatic Asylum respecting holding inquests on persons dying therein, *Adams* 1727-1740.

*County Rate Commissioners.* Their opinion upon the fees and allowances of coroners, *Baker* 301.

*County Rate.* Beadles receive no salary out of the county rate, from which the Act directs the magistrate to pay the expenses of inquests, *Wakley* 1427-1430—Illegality of the order withholding fees from paid constables out of the county rate, *Wakley* 1537-1547.

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*Deaths.* Letter from the coroner of the eastern division of Middlesex to the registrar-general of births, deaths and marriages, complaining of the loose manner in which members of the medical profession state the precise and real cause of death, *Baker* 1630, *Ev.* p. 128-130.

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*Deodands.* In cases of deodand, the coroner sometimes pays money which he has no power of recovering, *Baker* 142, 143.

*Deputy Coroners.* County coroners have no power to appoint deputies, *Baker* 190—Mr. Unwin and Mr. Stirling held inquests by deputy, without making any actual appointment of a deputy, *ib.* 121-195—The inquisition in such cases appeared to be the inquisition of the coroners in person, who signed their names to it, *ib.* 197-199—It would be useful in many cases if the coroner could appoint a deputy in the Duchy of Lancaster, and in particular liberties and franchises, *ib.* 196, 200, 201—Propriety of granting a power to appoint deputy coroners in certain cases, *ib.* 289-295—Inquests were taken by deputy in Mr. Stirling's time; no secrecy observed at any time in so doing, *Bell* 708-711—In other counties coroners frequently employ deputies, *ib.* 719—The magistrates were well aware of the practice of Mr. Stirling holding inquests by deputy, and never raised any objection, *ib.* 727, 728—Inquests were constantly taken in the house of correction by deputy, and no objection was ever made, *ib.* 735, 736—In the last year of Mr. Stirling's coronership, 37 inquests were held by deputy by witness alone, *ib.* 724—No objection was ever raised to holding inquests by deputy till Mr. Wakley was elected, *ib.* 746—How far coroners are empowered to hold inquests by deputy, *Laurie* 1006—None of the Middlesex magistrates were aware of Mr. Stirling having held inquests by deputy, *ib.* 1010-1014.

Power of Mr. Higgs to hold inquests by deputy, as coroner of the Duchy of Lancaster, *Laurie* 1015—Refusal of the coroners' expenses when inquests taken by deputy, *ib.* 1020; *Adams* 1247—A coroner cannot legally hold an inquest by deputy, *ib.* 1398-1403—Provisions of the Municipal Reform Act, respecting the appointment of deputy coroners in boroughs, *ib.* 1399—When Mr. Stirling held an inquest by deputy, the exercise of the office was then thought nothing about, *ib.* 1402—The inquests held by deputy were in 12 successive days, during which, witness was confined by illness; the magistrates disallowed the whole of the fees and disbursements in respect of them, *Wakley* 1474-1483—County coroners ought to have power to appoint deputies to hold inquests in particular cases, *ib.* 1484-1491—Grounds upon which the magistrates allowed Mr. Higgs' charges for inquests held by deputy, *ib.* 1551-1553—It is not legal to hold inquests by deputy in counties, *ib.* 1554—Witness received no intimation that the magistrates considered it objectionable to hold inquests by deputy until his charges were disallowed, *ib.* 1564-1573—The performance of the duty by deputy is proper if the coroner be held responsible, *ib.* 1574—Refusal of the magistrates to pay Mr. Wakley his fees and disbursements on inquests held by deputy, *Adams* 1707-1712.

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*Detention of Parties.* The proceedings of a coroner's inquest would favour the escape of the parties implicated, had not the coroner the power of ordering into custody, *Wakley* 1788, 1790.

*Deverill, George.* (Analysis of his Evidence.) Beadle of Shadwell, 558—Seventy-six pounds per annum salary, 562—Witness sworn in as constable's beadle as well as beadle; fees received, 563-565—Coroner will receive information from any one; the police mostly send to the beadle, 569—Mode of summoning the jury, 579—Witness selects the persons who are to be on the jury, 581—Witness attends inquests and summons the witnesses, 587, 588—Witness looks out for the evidence to be produced before the jury, 589—Mode of payment before the Poor Law Amendment Act passed for performing duties of inquests, 591—Formerly juries were paid, and have expressed great dissatisfaction at being no longer paid, 593—Since the allowance to juries has been withdrawn, there is a great difficulty in getting juries, 599—Same persons frequently

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*Deverill, George.* (Analysis of his Evidence)—continued.

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*Deverill, Mr.* Refusal of payment of his allowance as beadle of Shadwell for summoning juries on coroners' inquests, *Baker* 1602–1610.

*Disbursements.* The average amount of disbursements by Mr. Baker is 25s. each case; that of Mr. Wakley, 15s., *Wright* 505–508—Account of disbursements made under the authority of the 1 Vict. c. 68, from October to December 1839, by Thomas Wakley, coroner for Middlesex, upon taking 107 inquests, *ib.* 837.

See also *Accounts. Deodands. Schedule of Fees.*

*Domestic Servants.* Withdrawal of allowance to domestic servants attending at coroners' inquests, *Adams* 1710.

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*Ealing.* Allowance to constables and juries attending inquests in this parish, *Bell* 1089.

*Eastern Division of Middlesex.* Length, breadth and population of this district, *Baker* 9–11.

*Edmondes, Henry.* (Analysis of his Evidence.) Deputy clerk of the peace, Middlesex, 616—Mode of keeping and checking coroners' accounts, 618—No coroners' accounts have been returned from the general court to the committee of accounts in consequence of the absence of vouchers till October 1830, 623—Entries in the minute book of proceedings on that occasion, 626–630—Witness has examined the books, and finds there have been one or two deductions made from coroners' accounts since 1820, 635—Proceedings which took place in court on the subject, 636–660—Case of Mr. J. Unwin; examination of his account, deductions made, subsequently allowed, 662—Deduction from Mr. Baker's account, 1830, 663–665—Proceedings of the court on an application which was made to the Lord Chancellor in January 1839 with respect to the election of a third coroner for the county, 673—Order, after passing the Act 1 Vict. for payment of costs, for coroners to send in their accounts at a certain period, that it might be ascertained what expenses had been charged, 682.

*Election of Coroner.* Evidence relative to the mode of election of a coroner, *Adams* 1213—Present form of electing the coroner, *ib.* 1697–1700—Heavy expenses attendant on Mr. Baker's election to office, *ib.* 1701—Objection to the present mode of popular election, and proposal for vesting the appointment of coroner in the Crown, *ib.* 1702–1705.

See also *Additional Coroner. Appointment of Coroner. Pownall, Mr.*

*Ellenborough, Lord.* Objection to his lordship's decision in the case of *The King v. Justices of Kent*, *Baker* 1591.

*Essex, County of.* See *Fees.*

*Evidence.* Formerly, whilst the beadle was taking the jury to view the body, the coroner continued taking evidence, which was read over to the jury on their return, *Deverill* 610–612—It is the duty of the beadle to look out for evidence to be produced on the inquest, *ib.* 589.

*Examination of Prisoners.* How far desirable to have the party suspected examined before the coroner at the inquest, *Adams* 1632—How the practice in Middlesex differs from other counties as regards the examination of prisoners by magistrates after committal on the coroner's warrant, *Wakley* 1785.

*Expenses of Inquests.* No difficulty experienced with respect to the payment of the expenses of inquests until the circular of the Poor Law Commissioners issued in March 1837, *Bell* 1093—A coroner must pay the fees if he takes the inquest; power of magistrates to refuse to reimburse him, *Adams* 1269—Witness makes no charges besides those for fees, mileage and disbursements, *Wakley* 1499–1504.

See also *Accounts. Beadles. Constables. County Rate. Domestic Servants. Medical Witnesses. Poor Rate.*

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*Farrant, King v.* Case in which it was decided that a coroner could not legally hold an inquest by deputy, *Adams* 1402.

*Fees.* The fee, before the statute of the 1st of Victoria, c. 68, was 20s., *Baker* 12–14—Schedule of fees and allowances to be paid by the coroner, under 1 Vict., c. 68, *ib.* 35—No

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*Finance Committee of Magistrates.* The coroners' accounts are referred on the first day of the session to the general finance committee, *Wright* 413, 414—Names of magistrates present at the finance committee on each of the three sittings, when Mr. Wakley's account in the case of Coleman was brought forward, *ib.* 471–473. 476–479—Resolution of the committee on the second and third meetings, *ib.* 474, 475—It was the intention of the finance committee to disallow the charges for all inquests taken by deputy, *ib.* 511–515—No coroners' accounts have been returned from the general court to the committee of accounts in consequence of the absence of vouchers till October 1839, *Edmondson* 623—Reference of the coroners' accounts to the finance committee, *Laurie* 812.

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*Frewin, Edward.* Occasion of his declining to continue serving coroner's summons in St. Andrew's, Holborn, *Bell* 1124.

*Fulham.* Allowance to constables and juries attending inquests in this parish, *Bell* 1090.

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*General Court of Magistrates.* Causes of complaint by witness of the proceedings of the general court, *Wakley* 1532–1536.

## H.

*Hammersmith.* Allowance to the beadle and jury in attendance at inquests in this parish, *Bell* 1090.

*Hampstead.* Allowance to constables and juries attending inquests in the parish of Hampstead, *Bell* 1089.

*Hanwell.* See *County Lunatic Asylum*.

*Harefield Case.* Case at Harefield in which witness sent a person, against whom a verdict of murder had been given, direct to Newgate, *Wakley* 1151–1153—The magistrates at Harefield had a legal right to censure witness's conduct; whether it was discreet or not is another question, *ib.* 1507–1509.

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*Harefield Parish.* Allowance to constable and jury attending inquests in this parish, *Bell* 1090.

*Havering-atte-Bower Liberty, Essex.* Allowance to constable and jury for attending at inquests in this liberty, *Baker* 208.

*Hayes Case.* Circumstances attending the inquest at Hayes; committal of the accused by the magistrates for manslaughter after the jury had found a verdict of murder, *Wakley* 1144-1148. 1769. 1782—Items of expense incurred at the inquest at Hayes, and afterwards before the magistrates, *ib.* 1149, 1150—Particulars connected with the Hayes case, tending to prove that the magistrates were right in their view on the subject of the coroner's power, *Adams* 1631—Additional expense incurred to the county in the Hayes case by the subsequent proceedings of the magistrates, *Wakley* 1764—Censure passed on the coroner by the magistrates on that occasion, *ib.* 1775.

*Hendon Case.* Particulars relative to the inquest held on the boy Coleman at Hendon, *Laurie* 921. 932. 960; *Adams* 1236. 1289—Circumstances of an inquest at Hendon on Thomas Austin, and the disinterment of the body, *Wakley* 1154-1156—Mr. Williams, the Rector of Hendon, complained in the case of the inquest on Thomas Austin, and inquiries were immediately instituted into witness' accounts, *ib.* 1157-1162—Conduct of Mr. Wakley when he was informed that a funeral was in progress in the churchyard, *Adams* 1194.

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*Hertford, County of.* See *Fees.*

*Higgs, Mr.* Misunderstanding as to the right of Mr. Higgs, the coroner of the Duchy of Lancaster, to hold inquest by deputy, *Adams* 1706.

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*Hillingdon.* Allowance to the constable and jury in attendance at inquests in this parish, *Bell* 1090.

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2. *Increase of Inquests.*

1. *Generally.*

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1. *Payment of Juries.*

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*Lists of Witnesses.* The selection of the list of witnesses on the back of an indictment is made by the clerk of the arraigns, *Wakley* 1794.

*Lunatic Asylums.* It is quite unnecessary that inquests should be taken in all cases of death in lunatic asylums, *Adams* 1735—No such thing should be allowed as a private lunatic asylum, *ib.* 1736.

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*Marchant*, of Cadogan-place. Case of this prisoner being committed for wilful murder by the coroner without going before any magistrate, *Wakley* 1765.

*Marriages.* See *Registration of Births, Deaths and Marriages.*

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**Mileage.** The mileage before the statute of the 1st of Victoria was 9*d.* out, but not home, *Baker* 12-14—Manner in which the mileage is to be charged in future, *ib.* 176, 177—Alterations lately made in the mode of charging for mileage, *Wright* 498-504—The charges for mileage now objected to were never refused in Mr. Stirling's time, *Bell* 703—Rule adopted by Mr. Stirling for charging mileage, *ib.* 762—Rule adopted by his successor, *ib.* 765—Amount of mileage allowed to constables, *Laurie* 835—Objections raised to the charge of mileage for less than a mile from the coroner's house, *Wakley* 1454-1457—Mode of charging the mileage from place to place, *ib.* 1458—When witness desired to know how the magistrates wished him to charge mileage, one of them cautioned them not to give the explanation, *ib.* 1459-1461—Regulations relative to the payment of mileage to coroners, and how the subject was brought about, *Adams* 1713—Further explanation relative to the allowance of mileage to coroners, *ib.* 1722.

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**Necessity of Inquests.** How inquiries into the necessity of holding an inquest are conducted by the Middlesex magistrates, *Adams* 1235, 1236—A declaration of the law as to the parties who are to decide on the necessity of inquests is needed, *Wakley* 1497, 1498—Denial of the right of the magistrates to determine whether inquests are necessary; dangerous effect of the exercise of such a right upon the independence of coroners, *ib.* 1515-1520.

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**New Prison, Clerkenwell.** Practice in this prison with reference to prisoners who have been committed by coroners, *Kilsby* 1743—Case of a prisoner committed to this gaol by the late Mr. Stirling, *ib.* 1746—Directions given to the keeper of the new prison by the visiting magistrates not to receive a prisoner committed by a coroner, *ib.* 1758-1763.

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*Wright* 518-529—If any such payments were made contrary to the schedule, they would be struck off, *ib.* 536—All parish officers should be remunerated by the coroner for giving information of deaths where inquests ought to be held, *Baker* 1628, 1629.

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*Politics.* Impropriety of electing coroners for their political opinions, *Adams* 1674-1679.

*Poor Law Commissioners.* Issue of an order by the Poor Law Commissioners, directing that the expenses of inquests should no longer be paid out of the poor-rate, *Laurie* 895; *Adams* 1315.

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*Pownall, Mr.* Part taken by that gentleman in connexion with the election of a third coroner for Middlesex, *Adams* 1172.

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*Prisoners and Prisons.* How regulated in the county of Middlesex, *Laurie* 971.

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*Public-houses.* Emolument arising to the summoning officer in choosing the public-house at which an inquest shall be held, *Laurie* 1067.

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*Registration of Births, Deaths, &c.* The regulations of the registrar-general have been productive of great good in causing notice of death to be given, and have led to a great increase of inquests, *Baker* 307—Letter from the coroner for the eastern division of Middlesex to the registrar-general of births, deaths and marriages, complaining of the loose manner in which members of the medical profession, in their certificates to the registrar of the district, state the precise and real cause of death, *ib.* 1630, *Ev. p.* 128-130.

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*Schedule of Fees.* Allowances and disbursements to be paid by the coroner, pursuant to the Act 1 Vict. c. 68, *Baker* 34—Extract from the schedule authorizing the payment of constables for the performance of any duties connected with inquests, *Laurie* 899—The coroners of Middlesex and Westminster were consulted by the magistrates in preparing the schedule, as directed by the Act of 1 Vict. c. 68, *Bell* 1102-1112—Alteration of the schedule as respects the payment of constables, *ib.* 1113.

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*Sheriffs.* Mode of election of sheriffs of London and Middlesex, *Adams* 1214—Judicial authority of the sheriffs; exercise of it by deputy, *ib.* 1221-1224.

*Staines.* Allowance to the constable and juries attending inquests in this parish, *Bell* 1090.

*Stirling, Mr.* Account of inquests taken by Mr. Stirling from 1 January 1837 to 1 January 1838, *Wakley* 1450, *Ev. p.* 104—Case of the late coroner, Mr. Stirling, who remained coroner to the age of 91, long after he became unfit from his age, *Adams* 1684—Occasion of his being allowed to continue in office at his advanced age, *ib.* 1693—Other appointments besides that of coroner held by him under the magistrates, *ib.* 1694-1696—No objection was made to the payment of Mr. Stirling when inquests were held by deputy, *ib.* 1712.

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*Tubbs, Richard Thomas.* (Analysis of his Evidence.) Beadle of Islington for three years, 368-370—Fees paid to him and to the juries previous to the Act of Victoria, 371-373—Witness's allowances were raised from 4 s. to 7 s. 6 d. after that Act, 374, 375—Since last December the coroner has given him nothing, 376-378—The parish officers say they have no power to make such payments, 379—The beadles and constables are not likely to exercise so much vigilance, 380—There is much trouble in summoning juries; witness is often obliged to pay others to do the business, 381—He receives 100 l. from the churchwarden's rate, 382, 383—Number of inquests annually in Islington, 385—There is often much difficulty in getting a jury together, 386, 387.

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